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No. ①

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, and NATIONAL LABOR
RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. The National Labor Relations Board has a well settled policy of determining whether a strike is an unfair labor practice strike by focusing objectively on (1) whether the striking employees were aware of the unfair labor practice in question and (2) what actually motivated the employees to vote to go on strike. Should this Court review a decision of the Court of Appeals which overturns this traditional and accepted test and which focuses the inquiry instead on the unexpressed and entirely subjective state of mind of a union official who recommends that the employees vote to strike?

2. Should this Court resolve a conflict among circuit courts concerning whether employees must know of an employer unfair labor practice before such a practice can be considered a cause of a strike, when for the first time the court below held that an unfair labor practice not known to employees can be a cause of a strike?

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the District of Columbia Circuit handed down its decision in this matter on June 22, 1990. Reichhold Chemicals, Inc., Intervenor below, filed a Petition for Rehearing and Suggestion for Rehearing En Banc on August 6, 1990. No order

concerning this pleading has been received. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.*

This case concerns the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and case law arising thereunder.

STATEMENT OF THE CASE

From April 1 to April 6, 1984, employees represented by the Teamsters engaged in a strike at the Reichhold plant in Kensington, Georgia. Prior to the strike, the Union conducted two meetings during which employees in the bargaining unit voted on the question of whether to strike. The chief Union spokesman recommended that the employees vote to strike and in doing so discussed Reichhold's bargaining proposals, including specifically the management's rights and no-strike proposals. One portion of the no-strike proposal provided that, in certain limited circumstances, employees engaging in an illegal wildcat strike could waive their right to file unfair labor practice charges with the National Labor Relations Board over discipline that might be imposed on them for violating the no-strike pledge (no access clause). This no access clause was *not* mentioned in either of the meetings, and the employees were *unaware* of this proposal at the time they voted to strike.

*The parties to the proceeding below are the National Labor Relations Board, the International Brotherhood of Teamsters Local 515, and Reichhold Chemicals, Inc. Reichhold Chemicals, Inc. is a wholly-owned subsidiary of Dianippon Ink and Chemical, Inc.

During the course of the strike, Reichhold hired permanent replacements for some of the striking employees. When the strike was over, the Union made an unconditional offer to return to work on behalf of all striking employees. However, those strikers for whom permanent replacements had been hired were not recalled but were placed on a preferential hiring list to be available to fill future vacancies.

The Union filed charges alleging that Reichhold had bargained in bad faith and that this bad faith bargaining had caused the strike – making it an unfair labor practice strike. The National Labor Relations Board reviewed these charges and in a decision and order dated 22 November 1985, held that Reichhold had bargained in good faith and that therefore the strike had been an economic strike during which Reichhold had lawfully hired permanent replacements. *Reichhold Chemicals, Inc.*, 277 N.L.R.B. 639 (1985).

At the request of its General Counsel, the Board reconsidered this decision; and in a supplemental decision and order dated 17 March 1988, reaffirmed its previous finding of overall good faith bargaining by Reichhold but held that the no access clause was a permissive rather than a mandatory subject of bargaining. *Reichhold Chemicals, Inc.*, 288 N.L.R.B. No. 8 (1988). Consequently, the Board held that by including this clause in its final bargaining proposal Reichhold had committed an unfair labor practice.

The Board went on to review the circumstances that led to the strike, including the information available to employees when they voted to go on strike, and found

that the no access clause was not a cause of the strike. Specifically, the Board found that the no access clause was never mentioned to the employees, that this subject had not been discussed at either of the two meetings held for the purpose of conducting a strike vote, and that the no access clause played no role in the employees' decision to strike.

In considering whether the unfair labor practice was a cause of the strike, the Board applied the following traditional test:

the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection between insistence on [the no access clause] and the determination to strike.

288 N.L.R.B. No. 8, slip op. at 13. Accordingly, the Board reaffirmed its previous finding that the strike was an economic strike during which permanent replacements had lawfully been hired.

The Union sought review of the Board's decision, and on June 22, 1990, the Court of Appeals issued its decision upholding the Board's finding of overall good faith bargaining. On the question of whether the tainted no access proposal was a cause of the strike, the court rejected the test used by the Board and instead held that: "it is crucial to inquire whether the Union's reasons for recommending a strike can be imputed to the employees who voted for the strike." Slip op. at 10. The Court of Appeals accepted the Board's factual finding that the employees were unaware of the offending clause when they decided, by direct democratic vote, to go on strike; but the court nonetheless held that because the chief Union spokesman

had testified that the no access clause was one of his unspoken reasons for recommending that the employees vote to strike, the proposal had been a cause of the strike, making the strike an unfair labor practice strike. Consequently, the court held that Reichhold had unlawfully hired permanent replacements.

ARGUMENT

A. The Analysis of the Causes of a Strike is a Legal Determination Raising Issues of National Importance in Labor Relations.

Congress and the NLRB have carefully structured a balance of economic power between employers and unions by allowing each to resort to certain self-help remedies in the event that good faith bargaining fails to produce an agreement. Unions can strike, and employers can hire permanent replacements for striking employees. Both are drastic remedies designed to make each side think long and hard before failing or refusing to reach agreement. A strike is costly to an employer, and the prospect of permanent replacement is a strong deterrent for unions and employees. The combination tends to produce a balance of terror that encourages both sides to reach agreements - a goal expressly favored by national labor policy.

The Court of Appeals' decision departs from the traditional method of determining whether a strike is an unfair labor practice strike by shifting the focus from an objective and factual determination of actual employee motivation to one in which a union official's subjective

state of mind can be controlling. This new standard makes it much easier for unions to create unfair labor practice strikes because rarely will an employer be able to disprove the unspoken motivation of a union official. The practical effect is that – as was true in this case – even a minor or technical unfair labor practice can be seized upon after the fact to convert an economic strike to an unfair labor practice strike. This tends to give one party – the union – unbalanced control over the collective bargaining process, and will encourage strikes by limiting the prospect that a struck employer will be able to use a lawful self-help remedy – permanent replacement of striking employees. Such a fundamental shift in bargaining power should only come from Congress. This issue has national importance and has never been addressed by this Court.

B. The Court of Appeals Usurped the Role of the NLRB.

The NLRB has the primary responsibility for developing and applying national labor policy. *NLRB v. Curtin Matheson Scientific, Inc.*, ___ U.S. ___, 58 U.S.L.W. 4407, 4410 (1990). This Court has long recognized that the NLRB is an agency with special expertise in its area of responsibility. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). For this reason, the Supreme Court has stated that reviewing courts are not to “displace the Board’s choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.” *Id.*

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). Further, the Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938).

In this case, the Board found as fact that the employees decided, by direct democratic vote, to go on strike and that the employees had no knowledge of the employer's proposal that was only later found to be improper. The Board held: "In the absence of any evidence that the strikers even knew about the respondent's proposal regarding a waiver of access to the Board, *we are unwilling to infer from the record evidence in this case that one of the reasons for the strike was the strikers' desire to protest that particular proposal.*" 288 N.L.R.B. No. 8, slip op. at 13. This analysis is consistent with a "necessary and universal" principle of causation – "*the circumstance said to have excited the emotion must be shown to have probably become known to the person; because otherwise it could not have affected his emotions.*" Wigmore on Evidence § 389 (Chadbourn rev. 1979) (emphasis original).

The Union called upon the employees to decide (by direct democratic vote at two separate meetings held specifically for that purpose) whether to strike. The Union thus placed the employees in the role of the critical decisionmakers. The Board found as a matter of fact and

policy that the employees were the proper decision-makers. Thus, the Board properly refused to infer motivation on the basis of a fact not known to the employees.

C. The Circuit Court of Appeals' Decision Is Contrary to Precedent from Its Own and Other Circuit Courts of Appeals.

The decision conflicts with the Court of Appeals' holding in *Road Sprinkler Fitters Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982), *cert. den'd sub nom, John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983), where it held, "[m]ere awareness of unfair labor practices is insufficient to establish a casual connection." *Id.* at 20.

The decision conflicts with Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeals cases holding that the crucial determinant of the causes of a strike is the information motivating the *employees* in *their* decision to strike, especially statements and discussions in union meetings held to decide whether to strike by a vote of the affected employees. *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 (5th Cir. 1978); *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820-21 (6th Cir. 1975); *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704-07 (7th Cir. 1976); *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1320 (7th Cir. 1989); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983).

In *Road Sprinkler Fitters Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982), *cert. den'd sub nom, John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983), the Court of Appeals stated: "Mere awareness of unfair labor practices is insufficient

to establish a casual connection." *Id.* at 20. The Court of Appeals explained:

Board law holds that an unfair labor practice strike does not result merely because the unfair labor practices precede the strike. Rather, there must be a casual connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices.

Id. The Court of Appeals held that it must be shown that "unfair labor practices committed by the employer are a 'contributing cause' of the strike." *Id.* If "mere awareness" does not establish a casual connection, surely no awareness cannot do so.

When determining whether an unfair labor practice was a contributing cause of a strike, the courts look to the information possessed by the voting employees. In *NLRB v. Pope Maintenance Corp.*, *supra*, the court expressly noted that a strike vote was taken as a result of the numerous and widespread violations committed by the employer within the previous 10 days and relied upon testimony concerning what was said at the strike vote meetings. *Id.* at 906 and n.21.

In *Larand Leisurelies, Inc. v. NLRB*, *supra*, the unfair labor practices were discussed at three employee meetings, *id.* at 820-21, and in *Northern Wire Corp. v. NLRB*, *supra*, the court stated that "all the incidents actually occurred shortly before the strike and most were specifically adverted to at the strike vote meeting." *Id.* at 1320. In *Airport Parking Management v. NLRB*, *supra*, the court attached particular significance to testimony about discussion of conduct constituting an unfair labor practice before a vote authorizing a strike when compared with

the employees' prior decision by vote not to strike. *Id.* at 614.

NLRB v. Colonial Haven Nursing Home, Inc., supra, and *Winter Garden Citrus Products v. NLRB*, 238 F.2d 128 (5th Cir. 1956), illustrate that the employees' actual reasons for striking are controlling. In *Colonial Haven*, the Seventh Circuit noted that the union representative testified he advised employees that the reason for striking was the employer's unfair labor practices, and the employees testified they struck because of the unfair labor practices. The court, however, found the employees' real motivation for striking was to obtain recognition for the union. The court noted the highly technical nature of the violations and found "credulity is pushed beyond the breaking point to think that the conduct of the company which consisted of technical violations" was of such a nature as "to require resorting to the street in protest." The court concluded the highly technical nature of the violations found to have been committed by the employer reasonably could not have been a contributing cause of the strike.

Similarly, in *Winter Garden Citrus Products*, the union representative sent telegrams to the employer in which he declared the strike was caused by the employer's refusal to bargain in good faith and discrimination against union members. The court, however, noted that "the labor practices outlined above had never been considered by anyone as having such an importance as possibly to occasion a strike." The court, at page 130, found the union representative's representations to be the self-serving actions:

of a man who saw his cause slipping and who set about, by the expedient argumentative communications having no relevance to the situation

of the parties or the status of the negotiations as depicted by the other credible testimony, but at war therewith, in an attempt to salvage what he could from the ineffectual strike.

The Court of Appeals' decision herein conflicts with the holdings of these cases by focusing upon the Union representative's subjective state of mind rather than on the information possessed by the persons *charged by the union* with deciding whether to strike. The courts traditionally have looked to the employees' motivation for striking and have decided the issue of causation on the basis of what the employees knew at the time of their vote and what actually motivated them to strike. Similarly, the courts have rejected efforts by union representatives to salvage what they could from an ineffectual strike by attempting to ascribe motivations for striking that were not the real reasons for the employees' decision to strike.

CONCLUSION

The decision below is in conflict with a prior decision of the District of Columbia Circuit and with the decisions of the Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeals. Further, the decision is contrary to the traditional causation test formulated and applied by the National Labor Relations Board in an area where it has special expertise that should be accorded deference by the courts. The court rejected the Board's specific factual findings concerning the cause of the strike - findings that most certainly were supported by substantial evidence. Most importantly, the decision of the Court of Appeals

fundamentally alters the balance of power that Congress has struck to regulate bargaining relationships between employers and unions. For all these reasons, Reichhold respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 8, 1990

Decided June 22, 1990

No. 88-1413

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

On Petition for Review of an Order of
The National Labor Relations Board

James F. Wallington, with whom *Gary S. Witlen* and *James T. Grady*, General Counsel, were on the brief, for petitioner. *Wilma B. Liebman* and *Lynn Agee* also entered appearances for petitioner.

Julie E. Broido, Attorney, National Labor Relations Board, with whom *Peter D. Winkler*, Supervisory Attorney, *Jerry M. Hunter*, General Counsel, *Robert E. Allen*, Associate General Counsel, and *Aileen A. Armstrong*, Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

Chris Mitchell and *Maria N. Sorolis* were on the brief for intervenor.

Before: MIKVA, EDWARDS and SILBERMAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge EDWARDS.

Concurring opinion filed by Circuit Judge SILBERMAN.

EDWARDS, *Circuit Judge*: The petitioner in this case, Teamsters Local Union No. 515 ("Union"), seeks review of a decision and order of the National Labor Relations Board ("NLRB" or "Board") regarding alleged unfair labor practices committed by Reichhold Chemicals, Inc. ("Reichhold" or "Company") during the course of collective bargaining negotiations between the Company and Union. The Union contends that Reichhold's unlawful bargaining to a point of impasse to secure a "no-access" provision, under which the Union would waive access to the Board during the term of the parties' agreement, was a contributing cause of a strike conducted by bargaining unit employees at Reichhold. The Union contends that, because the employees' job action was caused by the Company's unlawful bargaining demand, the striking employees should be treated as unfair labor practice strikers, with full rights to reinstatement with back pay. We agree. The Board's contrary conclusion is not supported by substantial evidence in the record; therefore, we grant the Union's petition for review on this point.

We deny the Union's petition for review with respect to its other challenges, however. We agree with the Board that, apart from the demand for a no-access provision, Reichhold engaged in lawful "hard bargaining" consistent with the requirements of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169 (1988). We also find no basis for rejecting the Board's holding that the Act does not forbid bargaining parties from negotiating over or agreeing to waivers of the right to strike in protest against unfair labor practices. The Board's interpretation of the Act on this point is a permissible one, to which we must defer. *See, e.g., NLRB v. United Food &*

Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987); *United Mine Workers of America, District 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989).

I. BACKGROUND

A. *Factual History*

In January 1983, Reichhold Chemicals, Inc. and Teamsters Local Union No. 515, the collective bargaining representative for the production and maintenance employees at Reichhold's Kensington, Georgia, plant, commenced bargaining on an initial contract. During 29 bargaining meetings held between January 18, 1983, and February 15, 1984, the parties exchanged proposals and counterproposals. They reached agreement on a number of matters but were unable to agree on a management rights provision or on a no-strike clause, both of which the Union had identified as strike issues. As part of its proposed no-strike clause, Reichhold sought a waiver of the employees' statutory right to strike in protest against unfair labor practices and a waiver of certain statutory rights held by employees to seek redress from the Board and other governmental agencies.

The Union conducted two strike votes: one in August 1983, and one in April 1984. During the August 1983 strike-vote meeting, Union President Logan discussed the Company's proposals on management rights, the grievance procedure, the no-strike clause and various other provisions. Logan did not specifically mention the no-access provision, but he did tell the employees that the Company's proposals would seriously restrict the employees' rights to challenge employer conduct during

the term of the agreement. At the urging of the Union leadership, the employees voted unanimously to authorize a strike. Eight months later, on April 1, 1984, Union President Logan again met with the bargaining unit employees to conduct a second strike vote. In discussing the Company's demands, the Union President told the employees that there were items in the proposed management rights provision and the no-strike clause that were unreasonable, outrageous and unlike any he had seen before, and that if the Union agreed to those items it would not have a significant labor agreement. See *Reichhold Chemicals, Inc.*, 288 N.L.R.B. No. 8, slip op. at 12, 1987-1988 NLRB Dec. (CCH) ¶19,308 at 33,353 (1988) ("*Reichhold II*"). At the close of the meeting the Reichhold employees voted to strike. It is undisputed that the Company's inclusion of a no-access provision was a principal reason for the Union's objection to the no-strike clause.

Members of the Union struck Reichhold from April 1, 1984, to April 6, 1984, at which time the striking employees made an unconditional offer to return to work. Twenty-nine members of the Union were informed that they had been permanently replaced during the strike but would be given preferential hiring rights at the Reichhold facility. As of the date of the unfair labor practice hearing, twenty-seven employees had not been recalled.

B. *Procedural History*

In July 1984, the Union filed unfair labor practice charges with the Board.¹ The Union alleged that Reichhold violated section 8(a)(1) of the Act by threatening to

¹ The Union filed an amended charge in August 1984.

discharge employees who joined or engaged in activities on behalf of the Union; violated section 8(a)(5) of the Act by refusing to bargain in good faith; and violated section 8(a)(3) of the Act by refusing to allow employees to return to work following an unfair labor practice strike and the employees' unconditional offer to return to work. After investigating the charges, the Board's General Counsel issued an unfair labor practice complaint against Reichhold. The Board issued its first decision in this case on November 22, 1985. See *Reichhold Chemicals, Inc.*, 277 N.L.R.B. 639 (1985) ("*Reichhold I*"). The Union and the General Counsel for the Board moved for reconsideration; the Board then issued a supplemental decision and order on March 17, 1988. See *Reichhold II*, 288 N.L.R.B. No. 8, 1987-1988 NLRB Dec. (CCH) ¶19,308 (1988).

The Board concluded that Reichhold violated section 8(a)(5) of the Act by negotiating to impasse on a subject that is not a mandatory bargaining subject, namely, the no-access provision included in Reichhold's proposed no-strike clause. See *id.* at 8-10, 1987-1988 NLRB Dec. (CCH) at 33,352-53. The Board concluded, however, that the employees had engaged in an economic strike, not an unfair labor practice strike, as alleged; accordingly, the Board dismissed the portion of the complaint relating to violations of section 8(a)(3) of the Act. See *id.* at 13, 1987-1988 NLRB Dec. (CCH) at 33,353-54. The Board also determined that Reichhold had engaged in hard bargaining, not unlawful surface bargaining, in its negotiations with Local 515. See *id.* at 5, 1987-1988 NLRB Dec. (CCH) at 33,351. The Board further determined that a union may waive the right to strike in protest of an unfair labor practice and that such a provision is a mandatory subject

of bargaining. Local 515 now seeks review of those issues decided against it.

II. ANALYSIS

A. *Standard of Review*

In reviewing petitioner's claims, we must uphold the judgment of the Board "unless, reviewing the record as a whole, [we] conclude[] that the Board's factual findings are not supported by substantial evidence on the record considered as a whole, 29 U.S.C. § 160(f), or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue," *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1429 (D.C. Cir. 1989). See, e.g., *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981); *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704 (7th Cir. 1976); see also *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 20 (D.C. Cir. 1982) (noting that Board "fairly read the record" in determining purpose of the strike). Here, the record does not furnish substantial evidence to support the Board's conclusion that Reichhold's unfair labor practice of insisting to impasse on the no-access provision did not in part motivate the strike.²

² We understand this case to present the issue whether the Board's determination is supported by substantial evidence in the record, and evidentiary issue, and not a question concerning proper legal standard for establishing causation. Justice

B. No-Access Provision

We agree with the Board's determination that Reichhold's insistence to the point of impasse on a waiver of the Union's access to the Board constituted an unfair labor practice.³ We also agree with the Board⁴ that it is

(Continued from previous page)

Marshall, writing for the majority, and Justice Scalia, dissenting, recently traced the course of these distinct modes of analysis in *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990).

With respect to the instant case, neither the Board's decisions nor its brief suggests that the Board meant to endorse a *legal* principle that an employer's unlawful insistence on a nonmandatory subject can never be a contributing cause of strike absent clear evidence that the employees were fully aware of the nature of the offending contract demand. Indeed, as if to acknowledge the applicability of the substantial evidence test, in its brief the Board says that "the question before the Court is whether the Board was 'required' to draw the factual references urged by the Union and conclude that the waiver of Board access was a contributing cause of the strike." Brief for Board at 43. The Board then cites as supporting authority *Amalgamated Clothing Workers of America v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964) (*per curiam*), in which the only "question [was] the sufficiency of the evidence to support the Board's findings." See Brief for Board at 43-44.

³ Section 8(a)(5) provides, in relevant part, that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). An employer and the representative of its employees must bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." See *id.* § 158(d). Insistence upon matters *not* within the scope of mandatory bargaining as a condition to any agreement constitutes a refusal to bargain in good faith, in violation of section 8(a)(5). See, e.g., *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

⁴ See *Reichhold II*, 288 N.L.R.B. No. 8, slip op. at 10 n.19, 1987-1988 NLRB Dec. (CCH) at 33,353 n.19.

unnecessary to decide whether waiving access to the Board is a "permissive" or "illegal" subject of bargaining, because, here, Reichhold pressed the subject to impasse – which it may not do in either event. But we cannot agree that substantial evidence supports the Board's conclusion that the employees' job action that commenced on April 1, 1984, was an economic strike. Rather, we find it clear from the record that Reichhold's unlawful insistence to impasse on the no-access provision was a contributing cause of the strike.

If an unfair labor practice committed by the employer is a "contributing cause" of a strike, then, as a matter of law, the strike must be considered an unfair labor practice strike ("ulp strike"). See, e.g., *Road Sprinkler Fitters*, 681 F.2d at 20; *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975). "The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor." *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978). "The dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason." *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319-20 (7th Cir. 1989).⁵ The significance of this causation determination is that, unlike employees who strike for economic

⁵ See also *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981) ("Multiple motivation does not deprive the employees of their status as unfair labor practice strikers so long as the employer's unfair labor practice was a contributing

reasons, unfair labor practice strikers are entitled to reinstatement with back pay, even when they have been replaced. See *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). An employer's failure to reinstate ulp strikers violates section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3). See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

It is clear from the record in this case that Reichhold negotiated to impasse on a no-strike clause that included an *unlawful* no-access provision. Reichhold's original proposal provided, in relevant part, that, if an employee engages in any unauthorized strike, slowdown, walk-out or other cessation of work, "the Company shall have the unrestricted right to replace any and all such participants and they shall have no further rights under this Agreement and no action in law or equity or before any administrative agency, including the National Labor Relations Board." Respondent's Original Unauthorized Work Stoppage Proposal of February 24, 1983, Joint Exhibit 1, reprinted in, *Reichhold Chemicals, Inc. and Teamsters Local 515*, Case 10-CA-20331 at Appendix B (May 9, 1985), reprinted in Joint Appendix ("J.A.") 29. Reichhold's proposal of October 13, 1983, similarly provided that participants in activities prohibited by the work stoppage article "shall have no further rights under this Agreement and

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cause."); *General Drivers & Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir.) ("[I]f an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike."), *cert. denied*, 371 U.S. 827 (1962).

no action in law or equity or before any administrative agency, including the National Labor Relations Board." Respondent's Unauthorized Work Stoppage Proposal of October 13, 1983, General Counsel's Exhibit 8, *reprinted in, Reichhold Chemicals, Inc. and Teamsters Local 515, Case 10-CA-20331 at Appendix E (May 9, 1985), reprinted in J.A. 34*. Reichhold continued to insist on the no-access provision through the final four bargaining meetings. *See Reichhold II*, 288 N.L.R.B. No. 8, slip op. at 10, 1987-1988 NLRB Dec. (CCH) at 33,353.

It is uncontested that the Union President indicated at the bargaining table that the no-access provision was a strike issue. It is also undisputed that at the strike vote meeting the Union President told employees that Reichhold's proposals were "unreasonable and outrageous," and that "there were items in the management rights clause and the no-strike clause that he had never seen proposed before. He told those present that if the Union agreed to these proposals they would not have a significant labor agreement." *See id.* at 12, 1987-1988 NLRB Dec. (CCH) at 33,353.

The Board concluded, however, that "[i]n the absence of any evidence that the strikers even knew about the [Company's] proposal regarding a waiver of access to the Board, we are unwilling to infer from the record evidence in this case that one of the reasons for the strike was the strikers' desire to protest that particular proposal." *Id.* at 13, 1987-1988 NLRB Dec. (CCH) at 33,353. The Board explained that

the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection

between the [Company's] insistence on a waiver of employee's rights to go to the Board and the determination to strike. In light of our finding that this proposal was never discussed with employees at either of the strike-vote meetings, we decline to find that this proposal played any part in the employees' decision to strike.

Id., 1987-1988 NLRB Dec. (CCH) at 33,353-54.

The obvious flaw in the Board's reasoning is that it simply ignores the evidence that proves the point on causation. The dispositive criterion in a case of this sort is the "real and actuating motivation" for the strike. *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 (5th Cir. 1978); see also *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 705-06 (7th Cir. 1976) (looking beyond statements of testifying employees to discern true reason for strike). In this case, because the matter of the no-access provision was not specifically discussed at the strike meeting, it is crucial to inquire whether the Union's reasons for recommending a strike can be imputed to the employees who voted for the strike. That inquiry is relatively easy on this record, for it is unrefuted that the employees voted to strike solely pursuant to the Union President's recommendations.

At the hearing before the ALJ, the Company successfully objected to the admission of any evidence from employees as to why they struck. See Transcript of Hearing Testimony at 321-22, 333, reprinted in J.A. 296-97, 306. Having excluded this evidence, the board was constrained to consider only what the employees were told by the Union President in assessing causation. Thus, if the Union leader urged a strike because *he* thought the Company's demands were "outrageous," and the

employees then voted to strike, the question of causation is tied directly to the reasons that prompted the Union President to call for a strike. It is undisputed that one of those reasons was the inclusion of a no-access provision in the no-strike clause.

In short, there is no doubt that the concerns of the Union President posed a strike issue from the outset of negotiations. Indeed, the Board specifically found that, with respect to the first strike vote, "[t]he union president's feelings were clearly communicated when he told those present that no self-respecting union would sign such a contract. Convinced by the president's arguments in this regard, the employees voted unanimously to strike at that meeting." *Id. Reichhold II*, 288 N.L.R.B. No. 8, slip op. at 12, 1987-1988 NLRB Dec. (CCH) at 33,353. Furthermore, the evidence in this record plainly reveals that the employees struck because the Union President told them that the Company's demands (which included the no-access provision) were unreasonable and outrageous, that their labor agreement would be meaningless if they acceded to the Company's demands, and that a strike was necessary to break the deadlock in negotiations. *See id.* at 12-13, 1987-1988 NLRB Dec. (CCH) at 33,353. On this record, it must be found that, when the employees voted to strike, they impliedly endorsed their Union President's strong opposition to the no-access provision.

The Board's counsel argued that if the union agent had received proxies from the employees, then the Board, in assessing causation, would look to the agent's reasons for calling the strike. But the Board insists that, because the employees voted directly on the strike issue, their presumed lack of knowledge of the no-access provision is

fatal to their causation claim. This line of reasoning is impossible to follow. For one thing, the record indicates that at least five of the employees who participated in the strike vote were involved in the collective bargaining negotiations with the Company. These employees presumably knew, first-hand, of the offending no-access provision. Board counsel argued that knowledge by five employees was insufficient to prove causation, and yet conceded that knowledge by a majority was unnecessary.⁶ Counsel could offer no principled basis for determining how much evidence of first-hand knowledge is enough to prove causation.

Furthermore, apart from being illogical, the Board's position seems blind to the nature of union representation. Employees may formally cede authority to a union agent to call a strike;⁷ they can also achieve the same

⁶ We do not know how many other employees may have been told by these five employees of the precise disagreement over the no-access provision, because the employees were barred from testifying as to why they voted to strike.

The Board argues that it makes no difference whether the employees understood the meaning of the no-access provision. But this contention merely reinforces the point that the employees' vote was a ratification of the judgment of their union leader.

⁷ The law does not require unions to conduct a vote before calling a strike. See, e.g., *Grossman v. General Drivers, Local 579*, 78 L.R.R.M. 2179, 2182 (1971) (concluding that strike vote requirement "is strictly contractual and concerns a matter between the Union and its respective members, and is not a labor dispute as defined in the National Labor Relations Act, . . . and that there is no Federal question involved"); Pope,

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result by simply endorsing a union agent's judgment that a strike is necessary. In either case, the union representative's reasons for calling or recommending a strike may provide the basis for determining causation. Here the employees followed their Union leader's recommendation to strike, in part because of his view that the provisions of the no-strike clause were outrageous. In so voting, the employees ratified the Union leader's judgment that they should strike because of the Company's demand for a no-access provision.

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Labor and the Constitution: From Abolition to Deindustrialization, 65 TEX. L. REV. 1071, 1127 (1987) (noting that "[a]lthough unions are not required to conduct a vote before calling a strike, most union constitutions contain strike-vote procedures"); Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 801-14, 855 n.222 (1984) (discussing absence of requirement that employees ratify contracts and noting that "[t]here are no cases holding that members must ratify, and a great many cases rejecting the claim."). Nor may the employer propose requirements regarding strike votes. See *Borg-Warner Corp.*, 356 U.S. at 350. Such provisions involve "the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer"; a strike vote provision "deals only with relations between the employees and their unions." *Id.*; cf. *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 32 (D.C. Cir. 1986) (noting that employee ratification provisions are commonplace and "ensure[] some meaningful employee participation in the bargaining process"). "The union is legally required to follow the procedures prescribed in its constitution for making collective agreements, but the choice of procedures is the union's." Summers, *Ratification of Agreements*, in *FRONTIERS OF COLLECTIVE BARGAINING* 79 (J. Dunlop & N. Chamberlain eds. 1967).

In the light of the record before us, we cannot find substantial evidence to support the Board's determination on causation. Thus, we reverse the Board's determination that the strike was an economic strike and remand for modification of its order in accordance with this decision, including reinstatement and a determination of back pay.

C. *The Union's Challenges to Alleged Surface Bargaining*

The Union argues that the substance of the Company's proposals, the Company's failure to concede on any of the terms and conditions of employment encompassed within the management rights clause, and the negotiation to impasse on a provision that was not a mandatory subject are inconsistent with a determination that the Company engaged in good-faith bargaining. See Brief for Petitioner at 37-38. Accordingly, the Union claims that the Board erred in concluding that the Company's "overall conduct establishes that it engaged in lawful hard bargaining, rather than unlawful surface bargaining," *Reichhold II*, 288 N.L.R.B No. 8, slip op. at 2, 1987-1988 NLRB Dec. (CCH) at 33,349-50, and urges the court to find that the Board's determination lacks substantial support in the record. Because we find no infirmity with the Board's determination on this point, we deny the Union's petition.

While parties to a negotiation are "not required to make concessions or to yield any position fairly maintained," "[r]igid adherence to disadvantageous proposals may provide a basis for inferring bad faith." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187, 1188 (D.C. Cir.

1981) (emphasis added). See generally 29 U.S.C. § 158(d). "If a company insists on terms that 'no "self-respecting union" could brook,' *Vanderbilt Products, Inc. v. NLRB*, 297 F.2d 833 (2d Cir. 1961), it may not be fulfilling its obligation to bargain." *Id.* at 1188. But the decision regarding "good faith" turns on

"whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union."

Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1103 (1st Cir. 1981) (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953)). "Adamant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith." *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1072 (5th Cir. 1971). And " '[i]f the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate.' " *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1201 (6th Cir. 1979) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)). An inference of bad faith from substantive terms of a proposal always must be drawn with caution. " '[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' " *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970) (quoting *NLRB v. American Ins. Co.*, 343 U.S. 395, 404 (1952)).

Under this legal standard we conclude that the Board's determination regarding the Company's "good

faith" bargaining is supported by the record. The Board found, and the Union does not dispute, that the Company "was willing at all times to meet and bargain with the Union, attended all scheduled meetings, fulfilled its procedural obligations, exchanged proposals, and shortly after the last meeting notified a Federal mediator that it was willing to bargain with the Union in March." *Reichhold II*, 288 N.L.R.B. No. 8, slip op. at 5, 1987-1988 NLRB Dec. (CCH) at 33,351. We must uphold the Board's determination that there has been no violation of the Act unless it has no rational basis. See, e.g., *United Mine Workers of America, District 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir 1989). Here, it does.

D. *Waiver of Right to Engage in Unfair Labor Practice Strike*

The Union next claims that the Board erred when it found that Reichhold did not violate the Act by negotiating to impasse on a proposal to waive unfair labor practice strikes. The Union claims that the right to strike in protest of an unfair labor practice is a "non-waivable right," such as the right to engage in union distributions and solicitations. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-26 (1974). We disagree.

Congress' intent is unclear with respect to the specific issue whether a union may contractually waive the employees' right to strike in protest of unfair labor practices, and hence we must defer to the Board's "interpretation of the NLRA as long as its interpretation is rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); see also *Ford Motor Co. v. NLRB*, 441 U.S. 488,

496-97 (1979) (noting that Congress delegated to the Board responsibility for defining section 8(d) mandatory bargaining subjects). See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Board concluded that "[g]enerally a no-strike clause is a mandatory subject of bargaining. There is nothing in the Act which prohibits a union from contractually waiving the employees' right to strike over unfair labor practices as long as it satisfies its duty of fair representation." *Reichhold I*, 277 N.L.R.B. at 640 (footnote omitted).

The only inconsistency with the statute claimed by the Union is that such a waiver cannot be made "without jeopardizing fair representation" and compromising the employees' "full freedom of association" in violation of 29 U.S.C. §§ 151, 157. Brief for Petitioner at 44.⁸

⁸ Section 1 of the Act provides, in relevant part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

Section 7 of the Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

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Obviously, merely bargaining away the right to strike does not impermissibly infringe the "full freedom of association." See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983); *Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB*, 797 F.2d 1027, 1031 (D.C. Cir. 1986); *Fournelle v. NLRB*, 670 F.2d 331, 338 (D.C. Cir. 1982). Indeed, albeit limited, to the extent that the Supreme Court has spoken on this matter, it appears to assume that a union may lawfully waive the right to strike over unfair labor practices. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) ("[W]e assume that the employees, by explicit contractual provision, could have waived their right to strike against such unfair labor practices"); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (noting that courts "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.")

We can find no basis to overturn the Board's decision declining to distinguish between no-strike clauses covering only economic issues and those covering both

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bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

economic issues and unfair labor practices. There is nothing in the statute that compels such a distinction and the Supreme Court has never endorsed such an analysis. Also, as the Board obviously understood from its decision declaring the illegality of the no-access provision, employees who cannot strike over unfair labor practices are not without legal redress. Thus, we cannot understand the Union's contention that merely agreeing to a complete no-strike clause would breach its duty of fair representation. In any event, although brief, the path of the Board's reasoning is readily discernible, legally sound and not unreasonable. Cf. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, we must defer to the Board's interpretation of the Act and deny the Union's petition on this point.

III. CONCLUSION

There is substantial evidence to support the Board's determination that, on the record in this case, the Company engaged in hard bargaining, not surface bargaining. We also find the Board's interpretation of the Act allowing waivers of unfair labor practice strikes to be a permissible one. Thus, we deny the petitions for review on these points.

We conclude, however, that the Board's finding that the Company's insistence to impasse on a provision waiving employee access to the Board was not a contributing cause of the April 1984 strike is not supported by substantial evidence. We grant the Union's petition on this point and remand to the Board for modification of its

order in accordance with this decision, including reinstatement and back pay for the strikers.

SILBERMAN, *Circuit Judge, concurring*: I am in agreement with my colleagues, but I have the uncomfortable feeling that our mode of analysis – looking at the issue on review as solely a sufficiency of the evidence question – is a good deal closer to Justice Scalia's dissent in *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, than it is to the majority opinion. But if the Board wished here to suggest it drew an inference from the facts, to which we should defer because it is based on either policy choice or expertise, it was so inarticulate as to defeat my efforts to find it. Compare *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1472 (1987) (Silberman, J., dissenting).

288 NLRB No. 8

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REICHOLD CHEMICALS, INC.

and

Case 10-CA-20331

TEAMSTERS LOCAL 515

SUPPLEMENTAL DECISION AND ORDER

On November 22, 1985, the Board issued a Decision and Order in this proceeding¹ in which it reversed Administrative Law Judge Lawrence W. Cullen's findings² that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining and by insisting to impasse on a waiver of employees' statutory rights, and Section 8(a)(3) by permanently replacing striking employees.³

Subsequently, the General Counsel and the Charging Party filed timely motions for reconsideration with supporting briefs,⁴ and the Respondent filed a response to the motions.

¹ 277 NLRB 639.

² The judge's decision is attached.

³ The Board, however, affirmed the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening employees with discharge and the futility of bargaining.

⁴ International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a brief as *amicus curiae* in support of the motions for reconsideration.

The primary questions presented by the motions for reconsideration are whether the Board should consider the content of bargaining proposals in determining whether a party has bargained in good faith, and whether an employer lawfully may insist to impasse on a waiver of employees' statutory right to seek redress from the Board for discipline imposed under a contractual no-strike clause.

We have reconsidered this case in light of the briefs and the entire record, and have decided to modify the Board's prior decision and find that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse on a nonmandatory subject of bargaining, i.e., the waiver of access to Board processes which was part of its proposed no-strike clause. We, however, have decided to adhere to the Board's previous finding that the Respondent's overall conduct establishes that it engaged in lawful hard bargaining, rather than unlawful surface bargaining. In addition, we affirm the finding that the employees' strike was not an unfair labor practice strike and, therefore, the Respondent did not violate Section 8(a)(3) and (1) by permanently replacing striking employees.

The Board's original decision in this case found that the judge improperly based his finding of unlawful surface bargaining on the Respondent's insistence on a broad management rights clause, a narrow grievance definition, and a comprehensive no-strike provision which included a waiver of access to Board processes. The Board held that the Respondent's adherence to these three proposals was not evidence of an intent to frustrate the collective-bargaining process. In reversing the judge, the

Board stated that "[t]he Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith."⁵

On further reflection, we conclude that this statement is an imprecise description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining. Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith. The Board's earlier decision in this case is not to be construed as suggesting that this Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in certain situations.⁶

⁵ 277 NLRB 639 at 640.

⁶ We disagree with our dissenting colleague's suggestion that this case, pending reconsideration, either was "held captive" or "languished here . . . to no practical or beneficial purpose." Unlike him, we believe that some of the language in the original decision, together with its omission of a citation to *Atlanta Hilton*, could be arguably viewed by some as significantly modifying the law as to the Board's evaluation of the reasonableness of a party's bargaining proposals. See, e.g., *Mooreville IGA Foodliner*, 284 NLRB No. 120, slip op. at 22 (July 17, 1987) (Chairman Dotson, concurring in part & dissenting in part); *Boaz Carpet Yarns*, 280 NLRB No. 4, slip op. at 11 fn. 10 (May 30, 1986) (Chairman Dotson finding it unnecessary and

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That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.

Each party to collective bargaining "has an enforceable right to good faith bargaining on the part of the other."⁷ Enforcement of that right is one of the Board's most important responsibilities. Indeed, the fundamental rights guaranteed employees by the Act – to act in concert, to organize, and to freely choose a bargaining agent – are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach an agreement

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improper to analyze the substance of the parties' bargaining proposals). The supplemental decision filed today is an effort to eliminate the unintended uncertainty created in the wake of the Board's original Decision and Order. The fact is that the supplemental decision is not a purposeless exercise but is the product of careful, if extended, deliberations.

⁷ *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1 (1st Cir. 1981).

with the employees' selected collective-bargaining representative. The Board will not have fulfilled its obligation to look at the whole picture of a party's conduct in negotiations if we have ignored what is often the central aspect of bargaining, i.e., the proposals advanced by the parties.⁸

As our colleague states, the Board's prior decision in this case did not modify *Atlanta Hilton & Tower*⁹ and its "summary of legal principles," which include "unreasonable bargaining demands" as one of seven traditional indicia of bad-faith bargaining. Our colleague suggests that the "unreasonable bargaining demands" principle must be read in light of the Ninth Circuit's statement in *Seattle-First National Bank v. NLRB*,¹⁰ that inferences drawn from bargaining proposals "are not alone sufficient to support" a bad-faith bargaining violation.¹¹ We

⁸ As the court in *Eastern Maine Medical Center*, *supra* at 10, observed:

There is indeed a tension created by asking the Board to judge the reasonableness of the bargainers, but not to supervise the substance of their bargaining. The major resource making this tension tolerable is the agency's accumulated institutional experience in making precisely those sorts of judgments. We thus do not lightly disregard the Board's informed judgment in the especially delicate task of judging whether, in context, a strategy of bargaining is more likely calculated to obstruct agreement than to bring about the best compromise possible. [Citations omitted.]

⁹ 271 NLRB 1600 (1984).

¹⁰ 638 F.2d 1221 (1981).

¹¹ *Id.* at 1226.

note, however, that in its subsequent decision in *NLRB v. Mar-Len Cabinets*,¹² the Ninth Circuit explained that, although caution must be exercised in inferring motivation from the content of bargaining proposals (659 F.2d at 999):

Nevertheless, proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.

Consistent with the "legal principles" set forth in *Atlanta Hilton*, we intend to adhere to the general proposition that the content of bargaining proposals will, in certain circumstances, be evident of an intent to frustrate the collective-bargaining process.¹³

Nevertheless, having thoroughly reviewed the record in this case again, we reaffirm the Board's prior finding that the Respondent's overall conduct - including its proposals - establish that the Respondent engaged in hard bargaining, rather than surface bargaining. As noted in the Board's previous decision, the Respondent was willing at all times to meet and bargain with the Union, attended all scheduled meetings, fulfilled its procedural obligations, exchanged proposals, and shortly after the last meeting notified a Federal mediator that it was willing to bargain with the Union in March. During the course of 29 bargaining meetings held with the Union

¹² 659 F.2d 995 (1981).

¹³ See *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

over a 13-month period, the Respondent made concessions which led to agreement between the parties on numerous subjects, including grievance and arbitration procedures, seniority rights, job classifications and requirements, probationary period, layoff and recall, and safety and working conditions. In addition, the parties reached substantial agreement on provisions regarding subcontracting and the substantive and procedural aspect of a disciplinary system.

Although the Respondent – as was its right – adhered to its demands for comprehensive management rights and for no-strike provisions,¹⁴ it did make some movement on those subjects in an attempt to reach an agreement. Thus, on October 13, 1983, the Respondent offered revised management rights and no-strike proposals in direct response to the Union's identification of those two subjects as being among a number of "strike" issues.¹⁵ For example, the Respondent eliminated from its no-strike clause a prohibition against crossing a picket line which had been opposed by the Union, and added language to the clause which provided for arbitration of the question of employee participation in an unauthorized strike.

¹⁴ To the extent, however, that the no-strike proposal sought a waiver of access to the Board, we find *infra* that the Respondent's insistence to impose on the clause was impermissible.

¹⁵ At the bargaining session the Respondent also withdrew its proposed "More Favorable Provisions" clause which had been listed as a "strike" issue by the Union.

With respect to the management rights proposal, the Respondent's October 13 modification deleted several provisions which the Union had identified as "strike" issues, including management's right to implement any of the enumerated rights without notice to, or negotiations with, the Union; the right to determine unilaterally various pay rate systems; the right to establish, revise, or discontinue rules and regulations; and the right to institute security-related tests. Further, the Respondent added a paragraph which provided that the management rights clause shall not be exercised in such a way as to conflict with any other provision of the contract.

We note that, contrary to the General Counsel's contention, the Respondent's proposed grievance definition and revised management rights clause are substantially similar to provisions in a contract agreed to between the Union's sister local and another employer. In fact, the Union agreed to the Respondent's proposed definition of a grievance on November 15, 1983, as part of the Union's package offer which was contingent on the Respondent's acceptance of the Union's management rights and unauthorized work stoppage proposals. Further, the record shows that the sister local's contract has a no-strike provision which, except for a waiver of access to the Board, is similar to that proposed by the Respondent in this case. In sum, we find that the Respondent did not demonstrate the kind of intransigence or insistence on extreme proposals which is evidence of an overall intent to frustrate the collective-bargaining process.

NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960), and *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), relied on by the judge, are distinguishable from this case.

In *Herman Sausage*, the employer engaged in an extensive course of conduct which, separate from its bargaining proposals, demonstrated its intention to avoid any collective-bargaining agreement. Specifically, the employer unilaterally granted a wage increase absent an impasse in negotiations; added new demands whenever the union agreed to its initial demands; and made statements to employees which effectively urged them to withdraw from the union and depend solely on the employer's fairness. The employer in *A-1 King Size Sandwiches* presented a comprehensive package of proposals which sought to negate the union's fundamental representational role and, if accepted, would have left the union and the employees with substantially fewer rights and protection than they would have had if they had never gone to the bargaining table, but rather had relied entirely on the union's certification. Unlike those cases, here the Respondent did not seek to create a situation where the Union would have no voice whatsoever concerning any facet of the employment relationship. Further, we adhere to the Board's prior conclusion that the supervisor's threat which was found to be violative of Section 8(a)(1), as well as other supervisory statements cited by the judge, are not sufficient to establish that the Respondent intended to evade its obligation to bargain in good faith.

As mentioned above, however, on further consideration we reverse the Board's previous decision and find that the Respondent violated Section 8(a)(5) by insisting to impasse on a nonmandatory subject to bargaining, i.e., the waiver of access to Board processes which was part of its proposed no-strike clause. In addition to a waiver of employees' statutory right to strike, including in protest

of unfair labor practices, the Respondent's proposed unauthorized strike clause sought to have employees forfeit their right to seek redress from the Board or other tribunal for discipline imposed under the clause on strikers who are replaced.¹⁶ The judge found that the dual waiver of unfair labor practice strikes and of access to the Board was a "non-permissive" subject of bargaining in conflict with public policy and that the Respondent's insistence to impasse on it constituted a violation of Section 8(a)(5), separate from the surface bargaining violation.

In reversing the judge, the Board's prior decision found that the proposed waiver of the right to engage in unfair labor practice strikes was a mandatory subject of bargaining on which the Respondent was entitled to insist to impasse. Further, the Board found that the proposed waiver of the right to resort to Board processes was a mandatory subject of bargaining because it "is merely derivative of the waiver of the right to strike" - which clearly is a mandatory subject of bargaining. Thus, the Board held that the Respondent lawfully could insist to impasse on the waiver of the right to file charges with the Board. The Board relied in large part on the limited nature of the proposed waiver, noting that it applied only to replaced striking employees and did not extend to any other possible appeals by employees to the Board on other matters.

¹⁶ The Respondent's proposed no-strike provisions are set out as Appendices B and E of the judge's decision.

We affirm the Board's prior finding that the proposed unfair labor practice strike waiver is a mandatory subject of bargaining. After further reflection, however, we now conclude that the *in futuro* waiver of the right to Board access sought here is not a mandatory subject of bargaining because it is contrary to a fundamental policy of the Act and is unrelated to terms and conditions of employment. We agree with the judge's finding that the Respondent insisted to impasse on this waiver, and therefore we find that the Respondent violated Section 8(a)(5).

The Board and the courts have long recognized that there is an "overriding public interest" in "unimpeded access to the Board."¹⁷ Notwithstanding that the literal scope of the proposed waiver is narrow, we find merit in the General Counsel's contention that the waiver could have an improper chilling effect on the filing of charges in situations where the purported waiver would be ineffective. For example, employees may be deterred from seeking redress from the Board in circumstances where the discipline imposed pursuant to the no-strike clause is discriminatorily applied or is simply a pretext for retaliation for engaging in other protected activity. We are not persuaded otherwise by our colleague's assurances that employees would be able to ask a Board agent about the waiver. Board agents are not permitted to give legal advice and it is unclear just how much information about the waiver a Board agent could give an employee prior to

¹⁷ *NLRB v. Shipbuilders*, 391 U.S. 418, 424 (1968). See also *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679 (1964); *Iron Workers (Walker Construction)*, 277 NLRB 1071 (1985).

the filing of a charge and investigation of the merits. In any event, employees likely would read the waiver as foreclosing all recourse to the Board concerning discipline linked to the no-strike clause, and thus there is a strong probability that employees would not even make such an inquiry.

Further, the proposed waiver does not satisfy the test for mandatory subjects of bargaining set forth by the Supreme Court in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Closer examination of the proposed waiver of resort to the Board shows that it "settles no term or condition of employment"¹⁸ and does not regulate the relations between employer and employees in the manner contemplated by the Court in finding no-strike clauses to be mandatory subjects of bargaining. Accordingly, we find that the Respondent's continued insistence through the final four bargaining meetings on the nonmandatory subject of waiver of access to the Board violated Section 8(a)(5).¹⁹

The judge found that the employees' strike in April 1984 was an unfair labor practice strike because its primary focus was to protest the Respondent's "inflexible stand at the bargaining table concerning its management rights, grievance, and no-strike proposals, including its proposal that the employees waive their statutory rights." Accordingly, he found that the Respondent violated Section 8(a)(3) by permanently replacing 27 striking

¹⁸ *Borg-Warner*, supra, 356 U.S. 342, 350.

¹⁹ We find it unnecessary to decide whether this proposed waiver was an illegal, as distinguished from merely permissive, subject of bargaining.

employees who had made unconditional offers to return to work. In view of our dismissal of the surface bargaining allegations, we must determine whether, standing alone, the Respondent's unlawful insistence on its proposed waiver of recourse to the Board was, at least in part, a contributing cause of the employees' strike.

Contrary to the judge, we conclude that the strike was not an unfair labor practice strike. The Union conducted two strike votes: one on August 2, 1983, and one on April 1, 1984. The Respondent's contract proposals were discussed at both meetings. Though the testimony shows that the proposals were discussed in detail, there is no evidence that the waiver of recourse to the Board was ever specifically mentioned. The various proposals were discussed orally at both meetings, thus the employees did not have copies or any other written summarization of the Respondent's proposals before them as they voted on the strike issues.

According to the credited testimony, at the August 2, 1983 meeting, the Union's president told employees that he did not feel the employees could get anything without a strike. The president told the employees about the proposals which were still left on the table. In particular, he discussed the Respondent's proposals on management rights, the grievance procedure, the no-strike clause, inspection rights, and the stewards' rights and responsibilities. When discussing the no-strike clause, the union president told employees that the no-strike proposal would prevent a strike for any reason whatsoever or the honoring of a picket line of any kind. The union president's feelings were clearly communicated when he told those present that no self-respecting union would sign

such a contract. Convinced by the president's arguments in this regard, the employees voted unanimously to strike at that meeting. The Respondent's proposal limiting employees' access to the Board was incorporated into its no-strike clause proposal. Thus, even though the no-strike clause was discussed in some detail at the August 2, 1983 meeting, and even though the union president took pains to specifically outline what portions of the no-strike clause were unacceptable to the Union, nothing was said about the waiver provision in the no-strike clause.

Eight months later on April 1, 1984, still frustrated by the progress of negotiations, the Union once again met with employees to take a strike vote. The union president told employees that the Respondent's language was unreasonable and outrageous. The union president told employees that there were items in the management rights clause and the no-strike clause that he had never seen proposed before. He told those present that if the Union agreed to these proposals they would not have a significant labor agreement. Once again, the employees voted unanimously in favor of a strike. Though there were seven witnesses who testified about the strike-vote meetings, not one testified that anything was said about the Respondent's proposed waiver of employees' rights to go to the Board.

The record in this case establishes that the employees voted to strike because of their frustration with the Respondent's proposals regarding management rights, the definition of a grievance in the Respondent's proposed grievance and arbitration procedure, and the provisions of the no-strike clause which would prevent

employees from honoring another union's picket line or from going on strike for any reason. On our review of the totality of the circumstances in this case, every one of the proposals discussed by the Union at the strike-vote meeting has been found to be acceptable. In the absence of any evidence that the strikers even knew about the Respondent's proposal regarding a waiver of access to the Board, we are unwilling to infer from the record evidence in this case that one of the reasons for the strike was the strikers' desire to protest that particular proposal.

In so finding we are cognizant of the credited testimony by the union negotiator that at a September 15, 1983 negotiating session he designated the Respondent's proposed waiver to the Board as a strike issue. However, the union negotiator did not thereafter call a strike on his own initiative without further consultations with the membership. Rather, a subsequent union meeting took place on April 1, 1984, and resulted in a vote to strike. Thus, the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection between the Respondent's insistence on a waiver of employees' rights to go to the Board and the determination to strike. In light of our finding that this proposal was never discussed with employees at either of the strike-vote meetings, we decline to find that this proposal played any part in the employees' decision to strike.

Thus, on the facts before us, we conclude that the General Counsel has not established the requisite causal connection between the Respondent's unlawful conduct and the employees' decision to strike. See *Burlington Homes*, 246 NLRB 1029 (1979). Accordingly, we affirm the

Board's previous reversal of the judge on this matter, and find that the Respondent did not violate Section 8(a)(3) by permanently replacing the striking employees.²⁰

In light of the foregoing, it is apparent that in certain important respects the Board's previous decision in this case was flawed and did not properly focus on the issues presented to the Board. While this causes consternation, we are mindful that "wisdom too often never comes, and so one ought not to reject it merely because it comes late."²¹ Accordingly, the motions for reconsideration are granted, and the earlier decision here is vacated.

²⁰ Our dissenting colleague's characterization to the contrary notwithstanding, we see nothing "ironic" in our finding that the proposed waiver of recourse to the Board may have an improper chilling effect on employees' filing of charges, but that this proposal was not a cause of the employees' strike. The questions of whether a bargaining proposal is a nonmandatory subject of bargaining and of whether there is a causal connection between that proposal and an ensuing strike are distinguishable issues which turn on different standards of proof and legal theories. It is not inconsistent to conclude that an employer was not entitled to insist to impasse on a proposal because, inter alia, of its potential effect on employees and also to conclude that this proposal was not discussed with employees at strike-vote meetings. Neither does the finding that an employer unlawfully insisted to impasse on a proposal compel a finding that this unlawful conduct contributed to the employees' strike. The employees' lack of awareness of this proposal during negotiations does not diminish the effect that the proposal may have had on them if implemented.

²¹ *Henslee v. Union Planters Bank*, 335 U.S. 595 at 600 (1949) (J. Frankfurter dissenting.)

ORDER

The National Labor Relations Board orders that the Respondent, Reichhold Chemicals, Inc., Kensington, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or other reprisals if they engage in concerted activities on behalf of the Union, or with the futility of their continued support of the Union as their bargaining agent.

(b) Refusing to bargain in good faith with any union which is the certified or recognized collective-bargaining representative of its employees by insisting to impose on the waiver of the employees' statutory rights to seek redress from the Board for discipline imposed under a no-strike provision.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with any union which is the certified or recognized collective-bargaining representative of the employees²² in the following appropriate unit

²² The Respondent has averred in its response to the motions for reconsideration that the Union was decertified in January 1986 as a result of an election held in June 1984. This issue was not litigated, and there is no record evidence concerning this matter. Accordingly, we shall leave for the compliance stage the determination of whether the Union or any

(Continued on following page)

concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

All production and maintenance employees employed by Respondent at its Kensington, Georgia, facility, including lab technicians, but excluding all office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Kensington, Georgia, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(Continued from previous page)

other union is currently the exclusive collective-bargaining representative of the unit employees.

²³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 1988

James M. Stephens, Chairman

Marshall B. Babson, Member

Mary Miller Cracraft, Member

NATIONAL LABOR RELATIONS BOARD
(SEAL)

MEMBER JOHANSEN, dissenting.

The judge's decision issued in May 1985. Some 6 months later, we issued our decision. In January 1986, the General Counsel and the Charging Party moved for reconsideration. The case has languished here for over 2 years since then to no practical or beneficial purpose, held captive for reasons best known to the majority. Had the motions been rejected, the parties could long since have had judicial review.

Notwithstanding the amount of time the majority has had to consider these motions, the finding of no bad-faith bargaining is the same and the rationale appears to be, if anything, a "fine tuning" of the decision.

The original decision stated (277 NLRB at 640):

The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in

good faith. Accordingly, the Respondent's insistence on broad management-rights and no-strike clauses with a restrictive grievance provision is not evidence of an intent to frustrate the collective-bargaining process.

As the counsel for the General Counsel concedes in his brief on reconsideration, this rationale indeed followed and expressly relied on the statement in *Rescar, Inc.*,¹ that "[I]t is not the Board's role to sit in judgment on the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." At the end of that quote the Board in *Rescar* cited to *Atlanta Hilton & Tower*² and referenced its "summary of legal principles," which included "unreasonable bargaining demand"³ as one of seven traditional indicia of bad-faith bargaining. In quoting from *Rescar*, the decision inadvertently omitted the citation to *Atlanta Hilton*. The decision did not modify *Atlanta Hilton* or *Rescar*. On the contrary, I will continue to review bargaining proposals to the extent that they relate to bargaining tactics, as evidence of the totality of circumstances of bargaining. Consistent with *Atlanta Hilton* and other precedent,⁴ however, I would not find an 8(a)(5) bad-faith bargaining violation based on the content of allegedly unreasonable bargaining

¹ 274 NLRB 1 (1985).

² 271 NLRB 1600 (1984).

³ *Id.* at 1603.

⁴ E.g., *Browning-Ferris Industries*, 275 NLRB 71 (1985); *Hamady Bros. Food Markets*, 275 NLRB 1335 (1985); *Hedaya Bros., Inc.*, 277 NLRB 942 (1985).

proposals viewed in isolation from the context of negotiations.⁵

The reference in *Atlanta Hilton* to "unreasonable bargaining demands" itself included an explanatory footnote citation to *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717 (9th Cir. 1972). In *Holmes Tuttle*, the parties had bargained for at least 10 sessions when the union withdrew its own proposals and offered a contract incorporating the employer's extant proposals. In response, the employer raised numerous stylistic and typographical objections to the proposed contract and for the first time proposed that the contract should be of only 7 week's duration (the time remaining in the union's certification year) in light of an alleged but unfounded doubt of the union's continuing majority support. Describing the employer's conduct as a "cat and mouse game" that was the "exact opposite" of good-faith bargaining,⁶ the Ninth Circuit gave limited approval to Board examination of the reasonableness of the employer's bargaining proposals. It was clearly concerned, however, not with the substantive reasonableness of the proposals, standing alone, but with the totality of bargaining circumstances indicative of the employer's state of mind, including the reasonableness of the tactic of making those proposals at that time in the course of the negotiations. As subsequently explained in

⁵ Accord: *Struther Wells Corp. v. NLRB*, 721 F.2d 465, 470 (3d Cir. 1983); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1226 (9th Cir. 1981); also see *H. K. Porter v. NLRB*, 397 U.S. 99 (1970) (Board may not judge substantive terms of collective-bargaining agreements), and cases cited.

⁶ 456 F.2d at 719.

Seattle-First National Bank v. NLRB, supra, (638 F.2d at 1226):

While this court has sanctioned the Board's consideration of the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract, *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, supra, 465 F.2d at 719, inferences drawn from those proposals are not alone sufficient to support a finding of a violation of the obligation to bargain in good faith.

As for the part of the proposed no-strike clause seeking a waiver of recourse to the Board, the original decision found that the proposal was a mandatory subject of bargaining because it "is merely derivative of the waiver of the right to strike" - which clearly is a mandatory subject of bargaining. It is clear, and should not have to be reiterated, that the proposed waiver is limited to replaced striking employees and "does not extend to any other possible appeals by employees to the Board on other matters." Thus, the proposed waiver would not apply to a situation in which an employee was alleging that discipline imposed under the no-strike provision was discriminatory or pretextual.

Further, the proposed waiver does not preclude an employee from seeking information or assistance from the Board's agents regarding the waiver. If the Respondent retaliates against an employee for making such an inquiry, a violation of Section 8(a)(4) may be found. The only employees who would arguably forfeit their right to resort to Board processes are those who are properly disciplined for engaging in unprotected activity by breaching the no-strike pledge. Accordingly, to the extent

that this narrow provision might be characterized as limiting employee access to the Board, it more properly should be viewed simply as a redundant statement of the waiver of the right to strike. It is ironic that the majority finds this clause distasteful because of its "chilling effect," yet finds the strike not to be an unfair labor practice strike. It appears that although the Respondent's proposals were discussed by the union membership on two occasions, "there is no evidence that the waiver of recourse to the Board was ever specifically mentioned." Thus, the majority does not find that this clause was of any great concern to the individuals who would be "chilled."

I find no reason to reconsider the prior decision and would deny the motions for reconsideration.

Dated, Washington, D.C. March 17, 1988

Wilford W. Johansen, Member
NATIONAL LABOR RELATIONS BOARD

Reichhold Chemicals, Inc. and Teamsters Local 515.

Case 10-CA-20331

22 November 1985

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND BABSON**

On 9 May 1985 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining and by insisting to impasse on a waiver of the employees' right to strike. The judge also found that the

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

employees' strike in April 1984 was an unfair labor practice strike and that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate striking employees on their unconditional request to return to work. We reverse the judge's finding.²

The Union was certified by the Board on 5 November 1982 as the exclusive bargaining representative of the Respondent's production and maintenance employees. The parties began bargaining on an initial contract in January 1983. At the Union's request the parties deferred bargaining on economic matters until agreement was reached on all noneconomic matters. During 29 bargaining meetings held between 18 January 1983 and 15 February 1984 the parties exchanged proposals and counter-proposals, and reached agreement on a number of items. After the final session on 15 February 1984, however, the parties still disagreed about several noneconomic issues and therefore had not bargained with respect to economic matters. The Union struck the Respondent on 1 April 1984. The strike ended on 6 April 1984 when the Union made an unconditional return-to-work offer on behalf of all striking employees. At that point the Respondent ceased hiring permanent replacements for strikers, recalled a number of strikers who had not been replaced, and placed the remaining strikers on a preferential hiring list. As of the hearing, 27 strikers had not been returned to work despite their unconditional offers to do so.

² We affirm the judge's finding that the Respondent's supervisor Henry violated Sec. 8(a)(1) by threatening employees with discharge and the futility of bargaining.

The Respondents' initial contract proposal of 24 February 1983 included a broad management-rights clause, a narrow grievance definition, and a comprehensive unauthorized work stoppage provision. The Respondent amended its management-rights and work stoppage proposals on 13 October 1983 in an attempt to make them acceptable to the Union. Although the parties resolved many substantive issues during negotiations, they did not reach agreement on, *inter alia*, the management-rights clause, the definition of a grievance, or the no-strike clause.

The judge's surface bargaining finding is based primarily on the Respondent's insistence on these three proposals. He concluded that the management-rights, grievance, and no-strike proposals in combination were unreasonable and impeded any prospects for reaching agreement. In determining that the respondent engaged in surface bargaining, the judge also relied on the supervisory threat that he found violative of Section 8(a)(1), other statements by supervisors to employees which were not specifically found to be unlawful, and his finding that the Respondent unlawfully insisted to impasse on a "non-permissive" subject of bargaining, *i.e.*, the waiver of employees' statutory rights.

Contrary to the judge, we find that the totality of the Respondents' conduct throughout the course of negotiations establishes that the Respondent engaged in hard bargaining, rather than surface bargaining. The Respondent was willing at all times to meet and bargain with the Union, attended all scheduled meetings, fulfilled its procedural obligations, exchanged proposals, and made

concessions on numerous issues.³ The Supreme Court has held that an employer lawfully may bargain for provisions such as the Respondent's proposed management-rights, grievance, and no-strike clauses. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 407-408 (1952). Further, as the Board stated in *Rescar, Inc.*,⁴ "[I]t is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. Accordingly, the Respondent's insistence on broad management-rights and no-strike clauses with a restrictive grievance provision is not evidence of an intent to frustrate the collective-bargaining process.

As part of its proposed no-strike clause, the Respondent sought a waiver of the employees' statutory rights to engage in unfair labor practice strikes and to seek redress from the Board or other tribunal for discipline imposed under the clause on strikers who are replaced.⁵ The judge

³ In fact, the judge noted that it appeared that the Respondent was somewhat more diligent in attending meetings prepared to discuss matters than was the Union. Further, shortly after the 15 February 1984 meeting, the Respondent notified a Federal mediator that it was willing to bargain with the Union in March.

⁴ 274 NLRB 1 (1985).

⁵ The Respondent's proposed no-strike provisions are set out as Appendices B and E of the judge's decision.

found that the waiver of rights sought by the Respondent was a "non-permissive" subject of bargaining in conflict with public policy and that the Respondent's insistence to impasse on it constituted a violation of Section 8(a)(5), separate from the surface bargaining violation.

We disagree with any implication in the judge's use of the term "non-permissive" that the dual waiver of rights demanded by the Respondent is an illegal bargaining subject. Generally, a no-strike clause is a mandatory subject of bargaining.⁶ There is nothing in the Act which prohibits a union from contractually waiving the employees' right to strike over unfair labor practices⁷ as long as it satisfies its duty of fair representation. Further, the proposed waiver of the right of replaced striking employees to avail themselves of the Board's processes must, in the absence of other evidence, be read as permitting only nondiscriminatory application, and it does not extend to any other possible appeals by employees to the Board on other matters. Because this waiver is merely derivative of the waiver of the right to strike, it, too, is a mandatory subject of bargaining. Consequently, we find that the Respondent would have been entitled to insist to impasse on the dual waiver of rights in question.⁸ Accordingly, the Respondent's conduct with respect to

⁶ *Shell Oil Co.* 77 NLRB 1306 (1948).

⁷ See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

⁸ Having found that the proposed waivers are mandatory subjects of bargaining, we find it unnecessary to decide whether the parties reached impasse on them, and we disavow the judge's determination that the parties were at impasse regarding the waivers on 15 November 1983.

the proposed waivers was neither violative of Section 8(a)(5) nor indicative of bad-faith bargaining.

What remains of the totality of conduct relied on by the judge in finding surface bargaining are certain statements by supervisors to employees regarding the negotiations. We have found, in agreement with the judge, that in February 1984 a supervisor threatened two employees with discharge and the futility of bargaining. The judge also found that at unspecified times during the course of negotiations five different supervisors made workplace statements to three employees to the effect that the Respondent would not enter into a contract and that adverse consequences would occur if the employees went on strike. Although finding that a number of these statements occurred within the 6-month limitations period of Section 10(b), the judge did not find them to be violative of Section 8(a)(1), but merely cited them as evidence of bad-faith bargaining.

We conclude that the 8(a)(1) threat which we have found and the other supervisory statements cited by the judge are not sufficient to prove that the Respondent intended to frustrate the Union and employees in their attempts to negotiate a collective-bargaining agreement. There is no evidence that any of the supervisors involved were actual participants in those negotiations or in the development of the Respondent's negotiation policy. This away-from-the-table conduct is not sufficient to invalidate that which was otherwise lawful, good-faith bargaining by the Respondent.

In view of our findings that the Respondent did not violate Section 8(a)(5), it follows that the strike was not

an unfair labor practice strike. Accordingly, we also reverse the judge's finding that the Respondent violated Section 8(a)(3) by permanently replacing its striking employees.

ORDER

The National Labor Relations Board orders that the Respondent, Reichhold Chemicals, Inc., Kensington, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or other reprisals if they engage in concerted activities on behalf of the Union, or with the futility of their continued support of the Union as their bargaining agent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Kensington, Georgia, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge or other reprisals if you engage in concerted activities on behalf of Teamsters Local 515, or threaten you with the futility of

your continued support of the Union as your bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

REICHOLD CHEMICALS, INC.

Josephine S. Miller, Esq., and Victor A. McLemore, Esq., for the General Counsel.

Lowell W. Olson, Esq. (Constangy, Brooks, and Smith), of Atlanta, Georgia, for the Respondent.

Tim Edwards, Esq. (Gerber, Gerber & Agee), of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 3, 4, 5, 30, and 31 October 1984, at La Fayette, Georgia. The hearing was held pursuant to a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on 21 August 1984. The complaint is based on an amended charge filed by Teamsters Local 515 (the Union or the Charging Party) on 13 August 1984, and alleges that Reichhold Chemicals, Inc. (the Respondent) has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing a threat of discharge to Respondent's employees if they joined or engaged in activities on behalf of the Union and that it has violated

Section 8(a)(5) of the Act by refusing to bargain in good faith and that it has violated Section 8(a)(3) of the Act by refusing to allow its employees to return to work following an unfair labor practice strike and the employees' unconditional offer to return to work. The complaint is joined by the answer of Respondent wherein it denies the commission of any violations of the Act.

On the entire record in this proceeding, including my observation of the witnesses who testified herein, and after due consideration of the positions of the parties and briefs filed by the General Counsel and Counsel for Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS¹

I. JURISDICTION

The complaint alleges, the Respondent admits, and I find that Respondent is, and has been at all times material, a Georgia corporation with an office and place of business at Kensington, Georgia, where it is engaged in the manufacture of chemical products, that during the past calendar year (prior to the filing of the complaint), a representative period, Respondent sold and shipped from its Kensington, Georgia facility finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia, and that Respondent is, and has

¹ The General Counsel's unopposed posthearing motion to correct the record by including therein its G.C. Exh. 18 in the rejected exhibit file is granted.

been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE
ATLANTA, GEORGIA
REICHHOLD CHEMICALS, INC.

and

Case 10-CA-20331

TEAMSTERS LOCAL 515

Josephine S. Miller, Esq., and

*Victor A. McLemore, Esq., of Atlanta, GA,
for the General Counsel.*

*Lowell W. Olson, Esq., (Constangy, Brooks, and
Smith), of Atlanta, GA, for Respondent.*

*Tim Edwards, Esq., (Gerber, Gerber & Agee),
of Memphis, TN, for Charging Party.*

DECISION

Statement of the Case

Lawrence W. Cullen, Administrative Law Judge:
This case was heard before me on 3, 4, 5, 30, and 31
October 1984, at La Fayette, Georgia. The hearing was
held pursuant to a complaint issued by the Regional
Director for Region 10 of the National Labor Relations
Board (the Board) on 21 August 1984. The complaint is
based on an amended charge filed by Teamsters Local 515
(the Union or the Charging Party) on 13 August 1984, and
alleges that Reichhold Chemicals, Inc. (the Respondent)
has violated Section 8(a)(1) of the National Labor Rela-
tions Act (the Act) by issuing a threat of discharge to
Respondent's employees if they joined or engaged in
activities on behalf of the Union and that it has violated
Section 8(a)(5) of the Act by refusing to bargain in good
faith and that it has violated Section 3(a)(3) of the Act by

refusing to allow its employees to return to work following an unfair labor practice strike and the employees' unconditional offer to return to work. The complaint is joined by the answer of Respondent wherein it denied the commission of any violations of the Act.

Upon the entire record in this proceeding, including my observation of the witnesses who testified herein, and after due consideration of the positions of the parties and briefs filed by the General Counsel and Counsel for Respondent, I make the following:

Findings of Fact and Analysis¹

I. JURISDICTION

The complaint alleges, the Respondent admits, and I find that Respondent is, and has been at all times material herein, a Georgia corporation with an office and place of business at Kensington, Georgia, where it is engaged in the manufacture of chemical products, that during the past calendar year (prior to the filing of the complaint), a representative period, Respondent sold and shipped from its Kensington, Georgia facility, finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia, and that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

¹ The General Counsel's unopposed post-hearing motion to correct the record by including therein its GC Exhibit 18 in the rejected exhibit file is hereby granted.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The complaint alleges, the answer admits, and I find that:

All production and maintenance employees employed by Respondent at its Kensington, Georgia facility, including all lab technicians, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

On 5 November 1982, following an election held on 27 and 28 October 1982, the Union was certified as the exclusive bargaining representative of all of the employees in the above described unit. In December 1982, the Union requested that the Respondent bargain collectively with it and in January 1983, the Respondent and the Union commenced bargaining an initial labor agreement between them. At the request of the Union the

parties agreed to defer negotiating with respect to economic matters until agreement was reached on non-economic matters. During the period of the commencement of negotiations from January 1983 until February 1984, when the last negotiation meeting was held, the parties met on 29 separate occasions. During these negotiations the parties submitted proposals and counter-proposals and agreement was reached on a number of items. However, as of the date of the final negotiation session in February 1984, the parties had not agreed to several non-economic matters (some of which are the subject of the allegations of bad-faith bargaining in the complaint), and had not commenced bargaining with respect to economic matters. On 1 April 1984, the Union struck the Employer's facilities. The strike was of short duration and the Union offered the employees back to work to the Employer unconditionally on 6 April 1984. The Employer had hired some strike replacements during the short strike period and subsequently allowed its employees to return to work except for those for whom strike replacements had been hired. As of the date of the hearing in this matter, 27 strikers had not been returned to work by the Employer.

B. The alleged Section 8(a)(1) violation - The alleged threat issued by Supervisor Joe Henry to employees James Stoker and Jimmie Warnock

Facts

Employee James Stoker testified that in the second week of February 1984, he and employee Jimmie Warnock were working in the Employer's (chemical) laboratory

when shift supervisor Joe Henry entered the laboratory to pick up some shipping sheets. A conversation occurred concerning how business was and Stoker told Henry "that it looked like we was going to have to go out on strike" and that Henry replies that if the employees went out on strike they would lose their jobs as the Employer was not going to give the employees a contract. Stoker then inquired of Henry whether he thought the Respondent would give the employees a labor agreement if they went on strike to which Henry replied, "No, I don't" and "Things are going to be different." Stoker asked Henry what he meant and Henry replied, "Well, you will find out if you go on strike." Jimmie Warnock testified that Henry had stated that the Respondent would not give the employees a contract and that if they struck, the employees would lose their jobs. Henry denied having had the conversation or having made the statements although he acknowledged that he went through the lab once a shift as part of his responsibility as a shift supervisor. He testified further that in February or March of 1984, he went into the lab and found the phone off the hook after unsuccessful attempts by a foreman to get in touch with the employees in the lab and that he asked Stoker why the phone was off the hook and told him that he (Henry) would appreciate it if he (Stoker) would try to keep the phone on the hook. He contended that this was the only conversation he had with Stoker and Warnock. He acknowledged on cross-examination that he had talked to Stoker and Warnock on other occasions in the lab and that he has had general conversations with them. He also acknowledged having been present at meetings where the foremen or supervisors were informed as to

what was occurring in the contract negotiations between the Respondent and the Union. He testified that the negotiations were "briefly just scanned over" and that they were not informed as to the details but were told that "things were going smooth" and that "it was in the language stage and we weren't involved in any of that and I wasn't really concerned about it." He testified he did not recall ever having been asked anything concerning the contract by the employees, that they may have done so but that he just did not recall.

Analysis

I credit the testimony of employees Stoker and Warnock that Henry issued the threat as set out above. I found their testimony to be specific and credible. Conversely, I did not believe the denial of Henry that he had made such a threat. I also find it unlikely and do not credit his testimony that he was only generally apprised of the status of negotiations to the limited extent that things were going smoothly and that negotiations were in the language stage. I also consider it unlikely that he would not recall whether he had conversations with employees concerning the ongoing negotiations. I accordingly find that Respondent violated Section 8(a)(1) of the Act by the issuance of said threat of discharge and the futility of bargaining for a labor agreement, by its supervisor Henry to employees Stoker and Warnock.

C. The various alleged statements of Respondent's supervisors to certain of Respondent's employees concerning the contract negotiations

Facts

Employee David Reece testified that between January 1983 and 1 April 1984 (the date of the commencement of the strike), he had conversations with several of Respondent's supervisors, specifically Charles Mitchell, Terry Johnson, Joe Henry, Clyde Willingham, and Mac Agnew concerning the status of the contract negotiations. He testified that he had these conversations with Charles Mitchell, a production foreman on the A shift "a couple of times a month," but could not recall when these conversations took place, but testified they took place in the control room, the break room, and the stripper room. He testified that "Mitchell said more than once the company did not intend to give us a contract and if we did go out on strike, we could and would be permanently replaced, that they were going to run the plant with us or without us." He testified further that "Bobby" Edwards [sic Evans] was present at the time of this conversation.

Reece also testified that Clyde Willingham, a shift supervisor, spoke with him concerning the Union on an average of once every two or three months, that these conversations occurred in the store room and in the break room, but was also unable to place the dates or times of these conversations. Reece testified that Willingham told him, "that he was afraid we were going to lose our jobs. The company did not intend to give us a contract. They were going to run the plant if we went out on strike, we would be replaced."

Reece testified also that day shift yard crew foreman Mac Agnew discussed the Union with him about once a month when he (Reece) was on the day shift in the control room, and that Agnew told him that the company would not give the employees a contract and that if they went on strike they would be replaced and lose their jobs.

Reece also testified that production foreman Terry Johnson spoke to him once every two or three months concerning the Union in either the control room or the production foreman's office, but could not place the time or date of these conversations. Reece testified that Johnson told him, "that we were making a mistake, that we weren't going to get a contract, and if we went out on strike, when we did we would be replaced."

Reece also testified that shift supervisor Joe Henry discussed the Union with him every two or three months in the control room and possibly the breakroom, but was unable to place the date or time of these conversations. Reece testified that Henry told him, "that the company had no intention of giving us a contract. If we went out on strike, we would lose our job."

Warehouse employee Charles Smith testified that during the period from January 1983 until April 1984, he had conversations with Mac Agnew with whom he shared an office in the warehouse approximately once a month, but could not place the times or dates of these conversations. Smith testified that, "Mac Agnew told me that we would never get a contract, and we would stand to lose our job if we went on strike."

Employee Bobby Evans testified that he had approximately 15 conversations with supervisor Charles Mitchell concerning the Union after January of 1983, that the conversations occurred once or twice a month and picked up in number following the strike vote taken by the Union in August 1983. He placed these conversations as having occurred primarily in the vicinity of the break room with approximately two of them occurring in the lab. On two occasions employee Reece was also present. On other occasions employees Charles Autrey, Charles Hughes, and Jimmie Warnock may have been present. He was unable to place the dates or times that these conversations occurred. On these occasions Mitchell stated, "that we didn't have a chance of getting a contract, the company was not going to give us one and if we did strike, we would be without a job."

Respondent called as witnesses supervisors Clyde Willingham, Terry Johnson, James "Mac" Agnew, Wesley Lee "Joe" Henry, Jr., and Charles T. Mitchell, each of whom denied the statements attributed to him by the employees concerning the Union.

Supervisor Willingham initially testified on direct examination that he had never talked to David Reece about the Union, nor had any conversations with any other employee wherein he told the employee(s) that Respondent would never give the Union a contract. He testified that he was kept up to date concerning the progress of negotiations and that he had attended meetings with Herman Allison who was Respondent's outside counsel with respect to labor relations and the chief negotiator for Respondent. On cross-examination, Willingham acknowledged that he had heard employees discuss the

pending contract negotiations and that the employees had asked him how the negotiations were progressing, but denied that he told the employees anything as he contended that he did not know how negotiations were progressing. In response to further questioning on cross-examination, Willingham admitted that he had answered employees' questions concerning contract negotiations. He also admitted having had general conversations with employee Reece, but denied that they involved contract negotiations. In response to questioning by the undersigned, Willingham testified that he told several employees who questioned him concerning contract negotiations that they were in the language stage, but that was all he knew as he had not been informed of any more specific details of the status of the negotiations. He testified further on redirect examination that he had attended three supervisory meetings during the course of the negotiations.

Supervisor Terry Johnson testified on direct examination that he had had only a single conversation with Reece concerning the Union, and that this took place the day after the election and involved a statement by Reece that Reece appreciated that Johnson had not said anything to Reece prior to the election concerning the Union. He denied having had any other conversations with Reece concerning the Union. On cross-examination, he denied having had any knowledge of the progress of negotiations although he had attended supervisory meetings, but denied that the negotiations were discussed at those meetings. He testified that he was told not to talk to the employees (concerning the Union). He acknowledged

that the employees sometimes asked him how negotiations were progressing, but testified that he told him he did not know.

James "Mac" Agnew denied that he had ever talked to Reece about the Union. He acknowledged having had discussions with employee Charles Smith about the Union wherein he would ask Smith (a member of the Union bargaining committee) whether there had been any progress and Smith would reply that the parties were making progress. He denied ever having told Smith that Respondent would never give the Union a contract or that the employees would lose their jobs if they went on strike. He admitted that he had answered employees' questions concerning negotiations. He acknowledged that he had attended supervisory meetings wherein Respondent updated the supervisors and foremen on the progress of negotiations. In answer to questions from the undersigned, Agnew testified that in response to questions by the employees concerning the progress of negotiations, he answered their questions if he knew the answer and if he did not know the answer, he found out. However, in response to further questioning by the undersigned, he was unable to remember when these conversations occurred, with whom they occurred, or what he had told them.

Wesley "Joe" Henry, a shift supervisor, testified that he had never had any conversation with Reece concerning the Respondent's unwillingness to give the employees a contract or their replacement in the event they struck the Respondent. As noted previously in this decision, he also denied the statements attributed to him by employees Stoker and Warnock that he had told them

in February 1984 that Respondent would never give the Union a contract and that they would lose their jobs if they went on strike. He acknowledged on cross-examination that he had general conversations with Reece, Warnock, and Stoker. He acknowledged also that he had attended supervisory meetings wherein the supervisors were apprised of the status of negotiations, that they were told negotiations were going smoothly and were in the language stage. He testified he was not informed of the first strike vote (in August of 1983) at these meetings, but learned of it from the employees. He testified he did not recall whether he had been asked any questions about negotiations by the employees, but testified this might have occurred.

Production foreman Charles Mitchell testified that he had not made the statements attributed to him by employee Reece to the effect that the Respondent did not intend to give the employees a contract and that they would be permanently replaced if they went out on strike as Respondent was going to run its business with or without the employees. He also denied having made the statements attributed to him by employee Evans concerning the negotiations or the Respondent's unwillingness to give the employees a contract. He also testified that he could recall no specific discussion with an individual employee concerning the Union but testified he overheard conversations between other employees concerning the Union and negotiations. On cross-examination, he acknowledged that on some occasions he listened to conversations among the employees concerning the progress of negotiations and may have joined in these conversations and that he heard employees state that they wished

contract negotiations would be completed ("for it to get over with"). He did not recall the employees involved in these conversations other than employee Ragland who was a member of the Union's negotiating committee and with whom he discussed negotiations individually. In addition, Respondent called several employees who are currently employed by Respondent, all of whom testified that they had not been threatened with the futility of bargaining or adverse consequences if the employees went on strike.

Analysis

I credit the testimony of employees Reece, Smith, and Evans that the statements attributed to the various supervisors were made to the employees over the course of the contract negotiations as set out above to the effect that Respondent would not enter into a contract, that bargaining was futile, and that adverse consequences would occur if the employees went on strike. In making these determinations, I have considered the interests of the witnesses. Neither set of witnesses are impartial. Thus, each of the General Counsel's witnesses to these alleged conversations are employees who were permanently replaced and were not returned to work following their unconditional offer to return. Each of the supervisors called by Respondent to rebut the charges are currently employed by Respondent. I have also considered the inability of the General Counsel's witnesses to specify dates and times concerning these alleged statements by Respondent's supervisors. However, I am convinced that these employees were candid concerning these conversations, notwithstanding their substantial interest in the

outcome of these proceedings and their inability to specify the dates and times of these conversations. I find that this inability is (as the General Counsel contends) related at least in part to the large number of instances involved over an extended period of time. I also consider irrelevant the testimony of several current employees called by Respondent that they themselves were not threatened with the futility of bargaining or adverse consequences if the employees went on strike.

I cannot subscribe to Respondent's contention that these anti-union statements should not be imputed to it under these circumstances on the ground that the supervisors were not kept abreast of the status of negotiations. I find it unlikely that the supervisors were apprised of negotiations by Respondent only to the limited extent testified to by the supervisors that they were told only that the parties were at odds over language. I also do not find credible the uniform denials of these supervisors that such conversations took place. I note particularly in the case of supervisor Agnew that he acknowledged that conversations had occurred between himself and the employees concerning negotiations, but when questioned by the undersigned as to the specifics thereof, he testified he was unable to recall. I found the denials of these conversations by these supervisors to be stilted and unconvincing. I thus conclude that the various statements attributed to Respondent's supervisors did occur and reflected Respondent's intent to frustrate the Union and employees in their attempts to negotiate a collective-bargaining agreement.

D. The Alleged Bargaining Violations

Facts

Following the Union's certification in December 1982 and its submission of its initial contract proposal mailed to the Respondent on 28 December 1982, the parties commenced negotiations for an initial labor agreement with the first meeting held on 18 January 1983. The chief spokesman and negotiator for the Union was Noel Robert Carl Logan, Jr., the Union's president and business manager. On several occasions during the course of negotiations, other union representatives served as the spokesman for the Union in the absence of Logan. The chief spokesman and negotiator for the Respondent was its attorney, Herman Lee Allison. Including their initial negotiation meeting of 18 January 1983, the parties engaged in 29 separate bargaining sessions with the final session held on 15 February 1984. At the request of the Union the parties had agreed to set aside economic matters for discussion until non-economic matters were resolved.

In February 1983, the Respondent submitted its initial contract proposal including a lengthy and broad management rights clause, a restrictive grievance definition, and a restrictive unauthorized work stoppage clause. It subsequently amended its management rights and unauthorized work stoppage proposals on 13 October 1983.² During the course of negotiations the parties

² Appendix A - Respondent's original Management Rights Proposal of 24 February 1983 - Jt. Exh. 1.

(Continued on following page)

resolved many substantive issues. However, agreement was not reached on the management rights clause, the definition of a grievance, or the unauthorized work stoppage clause. These three clauses, among others, remained items of dispute throughout negotiations.

Business Manager Logan testified as follows: Following the submission of the Union's initial proposal on 28 December 1982, the parties commenced bargaining on 18 January 1983. The Company, through its representative Allison, submitted its initial proposals at a later meeting on 24 February 1983, including its proposals on the grievance procedure, management rights, and unauthorized work stoppage (Joint Exhibit 1). Various aspects of the Union's and the Company's proposals were discussed throughout the course of negotiations with agreement reached on a number of proposals and a number remaining unresolved. At the 18 March 1983 session, Allison told the union representatives that the Company had to have a basic management rights clause with the rights set out in the agreement. Company rules were also discussed

(Continued from previous page)

Appendix B - Respondent's original Unauthorized Work Stoppage Proposal of 24 February 1983 - Jt. Exh. 1.

Appendix C - Respondent's definition of a grievance in its original Grievance Procedure and Arbitration Proposal of 24 February 1983 - Jt. Exh. 1.

Appendix D - Respondent's Management Rights Proposal of 13 October 1983 - G.C. Exh. 7.

Appendix E - Respondent's Unauthorized Work Stoppage Proposal of 13 October 1983 - G.C. Exh. 8.

and Allison stated that the Company wanted sole discretion with the Union having no recourse through the grievance procedure. Stewards were discussed as were the grievance procedure and unauthorized work stoppage clauses, among others. At the session of 26 July 1983, section 1 of the grievance procedure was discussed and Allison stated the Company's position that a grievance was a specific violation of the contract whereas the Union contended a grievance was a (1) violation of the contract, (2) violation of past practice, (3) unfair treatment, or (4) violation of the law. At that meeting Allison stated that the Company was going to have a management rights clause and that the Union would be precluded from arbitrating management rights. Logan stated there would be a management rights clause but the Union would not give up its right to grieve. Allison stated the Union would not have the right to grieve the selling or closing of the plant in whole or in part. Logan said he had never signed a contract with that provision, whereas Allison stated he had never signed one without it. Logan told Allison he thought the Company was attempting to obtain an unfair advantage. At the next meeting on 27 July 1983, various provisions of management rights were discussed. Allison asked Logan whether he had any proposals to work out the disagreements, and Logan told him "Not at this time." At the session of 13 August 1983, the parties also discussed the definition of a grievance and Allison asked Logan what a grievance was to which Logan replied that it was a violation of the contract, past practice, law, or unfair treatment. Certain other items of the grievance procedure were agreed upon at that meeting. During this meeting inspection rights were also

discussed, as to whether a management representative should accompany a union representative at all times when he is in the plant. The Company's position was that the union representative should be accompanied by a management representative, whereas the Union's position was that he need not be accompanied by a management representative. At the meeting of 18 August 1983, the parties discussed grievance and arbitration and in answer to an inquiry by Allison, Logan told Allison the Union was not prepared to respond to the Company's proposals with regard to the grievance and arbitration procedure as he did not think there was any movement at that time and he would need to discuss this with the Union's attorneys. At the 30 August 1983 meeting, it was noted that the non-economic items remaining open or unresolved at that time were check-off, management rights, protection of rights, maintenance of stewards, work stoppage, subcontracting, pay day, and Appendix B. At the meeting of 15 September 1983, the parties discussed grievance and arbitration and management rights. Logan told Allison at that meeting that the Union would not agree to a more favorable provisions clause, and that the management rights clause was a strike issue. Logan listed what the Union considered to be strike issues, which were the more favorable provisions clause, grievance and arbitration, check off, management rights, no strike (unauthorized work stoppage), protection of rights, special rights, stewards, discharge and suspension, maintenance of standards, and subcontracting. At the meeting of 30 September 1983, Logan gave the Company a typed list of union proposals on remaining non-economic issues and made it a package and also gave the Company

amended management rights and unauthorized work stoppage proposals. The next meeting was 13 October 1983, and Allison told the Union that their package had left very little room for the Company to negotiate and that he had deleted from the Company's proposal a requirement under the no strike clause that employees cross a lawful primary picket line of another employer. Logan responded that this was covered in the Union's protection of rights proposal, whereas Allison responded regarding the setting up of picket lines, and stated if the parties had a contract the employees would be expected to come to work and cross a picket line. Logan responded, "You are trying to restrict the grievance procedure and preclude an arbitrator from ruling on legitimate grievances," and Allison responded, "You are absolutely right." At that point the parties stated that they had made all the moves they could. The Company withdrew its more favorable provisions clause at this meeting. The next meeting was held on 14 October 1983, and Allison stated the Company had made all the movement it could under the current circumstances, and Logan replied that, "I guess we were there, we had agreed to disagree" and stated that, "We intend to take action." The remainder of the meeting involved Allison's statements that the Company intended to operate the plant and would hire replacements, that the employees would be permitted to keep their insurance if they entered the plant and made arrangements to do so, and that he expected any picket line to be peaceful or the Company would take action. The next meeting was held on 15 November 1983, at which time a federal mediator was called in at the request of the Union. Various issues were

discussed at this meeting. The Union made the Company a package offer accepting the Company's section 1-A in place of the Union's section 1 grievance procedure proposal, accepting the Company's proposal in regard to "Agreement" and withdrawing the Union's protection of rights and maintenance of standards proposals if the Company would accept the Union's last proposal on management rights and unauthorized work stoppage, and also withdraw its proposal on the scope of the agreement. The Company agreed to accept the Union's offer to accept the Company's section 1 proposal of the grievance procedure, but stated that the grievance procedure would otherwise remain as proposed by the Company. Allison stated that the Company had made its last offer on management rights and unauthorized work stoppage. Logan told Allison that the Company had "grabbed up all the goodies" and otherwise "stood pat" on their position, and unless the Company would rethink its position, the Union would withdraw its proposals submitted as of this date. In response to a question from the mediator, Allison stated that management rights were not subject to arbitration. The mediator asked Allison about unfair labor practice strikes, and Logan stated the Union had the right to engage in an unfair labor practice strike under the law, and Allison replied it did not if it were waived in the contract. In response to a statement by Logan that the Company's position was that management rights were not arbitrable, Allison responded that this was not so as the first sentence stated that management rights was subject to the agreement. The next meeting was held 13 December 1983, and at the beginning of the meeting Logan announced that since the Company had rejected

the Union's proposals of 15 November 1983, that the Union was withdrawing these proposals and was now proposing its proposals of 30 September 1983, except in the area of its management rights and no strike clauses wherein the Union was reinstating its proposal of 18 March 1983. The Company requested a caucus, and upon its return Allison stated the Company would stand with their last offer, and that the Union had taken a giant step backward in its negotiations. The parties agreed to adjourn until the Union could make arrangements for its attorney to represent them in negotiations. The next meeting was held on 15 February 1984, at which time the Union was represented by its attorney Tim Edwards, and which was also attended by the federal mediator. At that meeting the definition of a grievance was discussed at length with Edwards addressing inquiries to Allison who told Edwards that past practice, management rights, and wage levels were excluded from the grievance procedure. Allison told Edwards that the Company was attempting to get an express waiver of sympathy strikes, and also that once the agreement was signed, the employees cannot go on strike for any reason whatsoever. Allison told Edwards the only aspect to be arbitrated if an employee went on strike was the question of participation, but that the severity of discipline imposed by the Company on the employee was not arbitrable. Allison acknowledged that the Company was requiring an express waiver of the employees' Section 7 rights under its unauthorized work stoppage proposal.

Logan testified that two strike votes were taken. Initially on 2 August 1983, Logan held a meeting with the employees and told them that it looked as if they were

not going to be able to obtain an agreement without a strike, as the company's management rights proposal would supersede the remainder of the contract; the Company's no strike clause proposal would prevent a strike for any reason whatsoever or honoring a picket line of any kind; the Company's management rights proposals severely restricted what could be grieved; and the Company's inspection rights proposal barred private conversations between union representatives and employees, and required stewards to conduct union business on their own time. He concluded that no self respecting union would put their name on such a contract. The employees voted unanimously to strike at that meeting.

Subsequently on 1 April 1984, Logan met with the employees again and informed them of the status of negotiations and told them that the Company's language was unreasonable and a strike was inevitable and reviewed the Company's management rights proposal again and told the employees it would supersede the remainder of the contract. He also reviewed what he had told them in the 7 August 1983 meeting with regard to the Company's unauthorized work stoppage proposal, and that if they agreed to these proposals, the employees would not have a significant labor agreement. A voice vote was taken and the employees unanimously agreed to strike that date, which they did. The strike lasted six days whereupon the Union offered the employees back to work to the employer unconditionally on 6 April 1984.

Union business agent Terrence E. Guffey testified that he attended the 1 August 1983 meeting at which the employees voted to strike and the 1 April 1984 meeting at which Logan told the employees that the management

rights clause proposed by Respondent would supersede ("take away") the other clauses in the contract. Guffey also testified that Logan discussed all of the contractual provisions on which the parties had not agreed, including the unauthorized work stoppage clause, after which a voice vote of the employees was taken and they unanimously voted to strike. On 6 April 1984, Guffey offered the striking employees back to work unconditionally to Respondent's plant manager Potts.

The testimony of Logan and Guffey concerning the two strike vote meetings was essentially corroborated by employees Stoker, Warnock, Reece, Smith, and Evans, who testified concerning these meetings. Stoker recalled that Logan discussed the management rights clause, the grievance and arbitration procedure, the no strike clause, and Respondent's proposal that a management representative accompany union representatives during plant visits. Stoker testified that at the 1 April 1984 meeting, Logan reviewed the management rights clause and the grievance procedures and told the employees that no self respecting union would accept the Respondent's proposals. Reece testified that Logan told the employees at the 1 April meeting that the Respondent's proposed management rights clause was unreasonable. Smith testified that Logan discussed the management rights clause, the no strike clause, and several other clauses at the 1 April meeting. Warnock testified that Logan discussed the management rights and no strike clauses and plant visits at both meetings. Evans testified that Logan told the employees at the August 1983 meeting that the Respondent's proposed management rights clause would supersede the rest of the contract and also discussed the no

strike clause, and that Logan told the employees at the 1 April meeting that the Respondent's position was the same and called for a strike vote.

The Respondent called 14 employees who either returned to work during the course of the strike or were recalled by Respondent after the strike, and who were all currently employed by Respondent at the time of the hearing. Most of these employees generally testified on direct examination that at the strike vote meetings they had attended in August 1983 and/or April 1984, Logan discussed as the central strike issue the Union's demand that it be allowed to make plant visits without the accompaniment of management representatives, and also an issue concerning stewards performing their union duties while on paid working time. On cross-examination, some of these employees acknowledged that Logan had discussed the Respondent's management rights proposal and no strike clause while other employees could not recall whether he had done so.

Respondent's legal counsel and negotiator Herman Allison essentially testified that the Respondent was willing at all times to bargain with the Union, attended all scheduled meetings, exchanged proposals, and that the parties reached agreement on many issues involving concessions on both sides, but that the Union remained unwilling to discuss the Respondent's proposed management rights clause throughout the course of negotiations; that Respondent at no time told the union representatives that any of its proposals or positions were final or that it was unwilling to consider counterproposals, and that it was prepared to meet and was awaiting contact from the federal mediator to set another meeting following the

February 1984 meeting, and was unaware of the strike until it occurred on 1 April 1984; that following the strike it commenced to hire permanent replacements for the striking employees, but permitted those employees who had not been replaced to return to work following the end of the strike and placed the remaining strikers on a preferential hiring list.

Allison testified as follows: On one occasion in June 1983, he requested that union business agent Guffey, who was substituting for Logan, discuss Respondent's proposed management rights clause and Guffey responded, "There ought to be something better to talk about than that." At another bargaining session on 26 July 1983, he offered to business manager Logan to go through Respondent's management rights clause point-by-point and told him everything was open to discussion, but was unsuccessful in getting Logan to discuss it, except that Logan listed the items of the management rights proposal the Union did not agree with, and that he (Allison) asked Logan whether he (Logan) had any proposal for resolving the managements' rights clause or any part of it and that Logan responded, "Not at this time." Logan would not tell Allison what problems he had with Respondent's managements' rights proposal or its unauthorized work stoppage clause. The parties also disagreed on the definition of a grievance. At the July meeting, Logan continued to object to management's proposal that union representatives be accompanied through the plant by management representatives. During the course of negotiations, the parties removed several items from other articles and placed them into Respondent's management rights proposal to obtain agreement on the other articles. At a

negotiation meeting on 15 September 1983, Logan told Allison that "We are all in on Grievance and Arbitration," as he (Logan) saw no significant movement that could be made and then suggested the parties discuss management rights, and then listed six items of the Respondent's proposed management rights clause as strike issues, and then designated several strike issues in Respondent's unauthorized work stoppage clause. Logan then told Allison that there were other items in these two clauses which were also strike issues, but which the Union was willing to discuss. The parties never discussed in detail any of the six items designated as strike issues in Respondent's management rights proposal or any of the six items designated as strike issues in Respondent's unauthorized work stoppage proposals. The six designated strike issues in the management rights clause were: (1) "the unqualified right to place any or all of such rights into effect without notice to, or negotiations with, the union"; (2) "the right to determine from time to time which jobs shall be paid on piece, hourly, piece incentive, or bonus rate, including the right to formulate and institute such systems unilaterally and without notice to any party"; (3) "the right to determine . . . or other tests for the security of the employees, plant premises, or property of the Company's" (4) "the right to determine whether to use employees full-time or part-time"; (5) "the right to establish, revise, or discontinue policies, practices, procedures, rules and regulations for the conduct of business, and from time to time to change, amend, modify, or abolish such policies, practices, rules and regulations subject to the provisions of this agreement"; (6) "It is hereby agreed that the reserved management rights as set forth

herein, or elsewhere in this Agreement, shall not be subject to the grievance and arbitration provisions of this Agreement nor shall they be subject to impairment by an arbitration award under this Agreement." The six designated strike issues in the Respondent's unauthorized work stoppage proposal were: (1) the prohibition against sympathy strikes; (2) the prohibition against "including any manner of stoppage not herein specified or anticipated by the parties. Failure or refusal on the part of any employee to comply with any provision of this Article shall be cause for whatever disciplinary action, including suspension or discharge, against whatever number of employees is deemed necessary by the Company. In administering such discipline, the Company may distinguish between leaders and other participants in the unauthorized work stoppage, strike, slowdown, or other interference with production."; (3) Following a requirement in the clause that the Union use all efforts at its disposal to return striking employees to work and enforce all penalties provided for in its constitution and "the failure of the Union to so act, after due notice given by the Company, shall be construed to mean that the Union sanctioned or condoned the action of the employees involved. Such communication shall be communicated by the Company as it deems appropriate."; (4) "Neither the violation of any provision of this Agreement nor the commission of any act constituting an unfair labor practice or otherwise made unlawful by any federal, state, or local law shall excuse the employees, the Union, or the Company from their obligations under the provisions of this Agreement."; (5) "It is expressly understood and agreed that an employee covered by this

Agreement shall not withhold their services from the Company in connection with any labor dispute, whether or not at the Employer's premises, and it is agreed that the Union will not authorize or condone the action of any employee in so withholding their services, including cases where the performance of such services may require that the employees cross and work behind picket lines established by this or other local unions or other labor organizations at any place, including a customer's place of business. There shall be no refusal to work on, handle, or produce any materials or equipment because of a labor dispute affecting this Company, a vendor purchaser, supplier, or carrier of said materials or equipment."; (6) "It is further agreed that if such prohibited activity occurs the company shall have the unrestricted right to replace any and all such participants and they shall have no further rights under this Agreement and no action in law or equity or before any administrative agency, including the National Labor Relations Board. This right to replace employees engaging in misconduct prohibited by this Article shall be in addition to other disciplinary action, as deemed appropriate by the Company, provided for in this Article."

At the hearing Allison contended that the designated strike issue number 6 in Respondent's unauthorized work stoppage proposal was a "throw away," that he inserted to trade off by giving it up in order to bargain for something else in another clause. Allison testified that Logan also listed check off, inspection rights, and stewards as strike issues, but contended that the only area of disagreement with respect to stewards was whether they

would be paid, and that the only disagreement on inspection rights was whether union representatives must be accompanied by members of management when they made plant tours, and that the Respondent had already indicated to the Union that it would agree to check off, but wanted to discuss it under economic issues and to obtain something in return for it. Allison testified further that on 30 September 1983, Logan gave Respondent a counterproposal as a package on non-economic matters and told Respondent that it had to be accepted in total and could not be accepted in part only. This package included a typed counterproposal on management's rights and on unauthorized work stoppages. Allison told Logan Respondent would need to review the counterproposal and to reconvene to consider it, and the parties met again on 13 October 1983, at which time Respondent offered a counterproposal to the Union's proposal of 30 September 1983, and told the Union that it was not a package offer and the Union could select items of agreement if it chose. According to the testimony of Allison, he inquired whether Logan would agree to insert "leadership ability" in the requirements for the quality control shift leader position if the Respondent agreed to all of the outstanding issues and Logan stated he would not do so.³ Allison also withdrew the Respondent's most favorable provisions clause. Logan proposed that the parties adjourn for the day and that Respondent give him its position the next day. The parties met the next morning and Allison told Logan that the Respondent could not

³ Logan was recalled on rebuttal by the General Counsel and denied that Allison had made such an offer.

move further at this time because of the Union's insistence that Respondent accept the Union's package proposal in its entirety or not at all, but that Respondent was willing to consider any changes or revisions the Union would advance, and that the Union was free to pick and choose among the proposals offered by Respondent. The Union requested a break, and on its return Logan stated, "Herman (Allison), I reckon we are there," and after further conversation stated, "Reluctantly, we must take action." Allison then told Logan that in the event of a strike the Respondent would continue to operate the plant with replacements if necessary to do so, and would permit the employees to continue their group insurance if they came in and made arrangements to do so, and that Respondent expected any picket line to be peaceful. Logan requested Respondent to contact him if there was a change in its position and stated he would do the same.

Allison testified further that on 15 November 1983, at the Union's request, the parties met with a federal mediator, Maurice Tipple. At Allison's request, Logan went over several outstanding items and proposed changes on some of them. The Respondent caucused and on its return told Logan his proposals were not significant but that Respondent would go through them and did so at this meeting, and Respondent agreed to some of the Union's proposed changes, including the Union's agreement to accept the Respondent's definition of a grievance. Allison told Logan that with respect to management rights that Respondent's "position at this point in time was as stated in our last offer," but denied that he had told Logan that the Respondent had made its last offer on management rights and unauthorized work stoppage.

The last offer of Respondent referred to by Allison was its written proposal of 13 October 1983. After Allison had gone through all of these provisions, the Union caucused and on its return stated that Respondent "had gobbled up all the goodies and stuck to (its position." The parties' representatives Logan and Allison then met with the mediator and agreed to another meeting which was ultimately scheduled for 13 December 1983. Allison contends that after the meeting the parties were in agreement with respect to management rights and in substantial agreement on the unauthorized work stoppage clause. At the meeting of 13 December 1983, Logan stated that since Respondent had rejected his last proposal that he was withdrawing all of the Union's proposals at the last meeting and was returning to the Union's proposals of 30 September 1983, except with respect to management's rights and unauthorized work stoppage, with respect to both of which the Union was returning to its initial proposal of 18 March 1983. Respondent caucused and on its return Allison told Logan that he was upset as he had thought they were close to agreement and that the Union had taken a giant step backward in their negotiations. Logan suggested he bring in the Union's attorney Tim Edwards, and Allison agreed.

The parties next met on 15 February 1984, with Edwards speaking on behalf of the Union. Edwards commenced by asking Allison questions as to what was covered in the grievance procedure and what was excluded. Allison told him management rights was excluded from the grievance procedure. Edwards also inquired whether Allison was attempting to obtain an express waiver of

sympathy strikes to which Allison replied in the affirmative. Questioning by Edwards centered primarily on what was covered under the grievance and arbitration procedure. The meeting broke up with Respondent walking out in protest over Edwards' method of questioning Allison. When the parties returned, Edwards told Allison that the unauthorized work stoppage clause was not agreeable, and he believed that another paragraph of the Respondent's proposal on unauthorized work stoppages was not legal. At the suggestion of the mediator, the parties adjourned. Allison subsequently received a call from the mediator asking whether he would be willing to meet in March, and agreed to do so but had no further contact from the mediator. Management rights had never been discussed.

The Union's proposal of 30 September 1983, regarding management's rights was almost identical to the Respondent's proposal with the exception of Respondent's proposal that management rights were not subject to the grievance procedure, and the Union's 30 September 1983 unauthorized work stoppage clause was considerably more restrictive than its 18 March proposals. On cross-examination, Allison acknowledged that he at no time advised the Union that there were any throwaways in Respondent's unauthorized work stoppage proposal.

Analysis

1. The surface bargaining allegation

The General Counsel contends that Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act in this case by insisting on a

broad managements rights clause and a restrictive grievance procedure and unauthorized work stoppage clause as the broad management rights clause retained in Respondent control over every facet of the employment relationship permitting management to change these terms and conditions of employment at will, and that this coupled with the restrictive grievance procedure which precluded the assertion of anything arguably a management right as a grievance and the restrictive unauthorized work stoppage clause which prohibited the employees from engaging in a strike of any kind including an unfair labor practice strike or a Section 502 strike protesting hazardous conditions as would be particularly applicable in the case of a chemical manufacturing operation such as Respondent has, and which also precluded access to the National Labor Relations Board or any other governmental agency, all combined to render the labor agreement a nullity. The General Counsel relies on *NLRB v. Herman Sausage Company, Inc.*, 275 F.2d 229, 231 (5th Cir. 1960) wherein the Board and Court looked to the substantive positions taken by the employer in bargaining to determine whether the employer had made a good-faith effort to bargain, and concluded it had not. As in the instant case the employer had engaged in bargaining over a long period of time, exchanged proposals, and made concessions, but the Court held in *Herman Sausage*, *supra*, that these actions by the employer could be the method by which the employer could conceal its strategy to make bargaining futile. The General Counsel also relies on *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), a case it asserts is factually very similar to the instant case and in which case the Board found that the employer's state of

mind was inconsistent with a willingness to reach agreement in view of its insistence on its management rights, no strike, and nondiscrimination and waste proposals "retaining to itself total control over virtually every significant aspect of the employment relationship." In *A-1 King Size Sandwiches, Inc.*, supra, the employee also had proposed restrictive grievance and no strike clauses as in the instant case. The General Counsel also relies on the statements of Respondent's supervisors to certain of the employees as found supra to the effect that Respondent would not agree to a contract, and that adverse consequences would occur if the employees went on strike. The General Counsel also points to the conduct of Respondent's chief negotiator Allison as evidence of Respondent's lack of good faith in bargaining for a labor agreement, particularly his manner of testifying at the hearing in this case, and his assertion at the hearing that a portion of its unauthorized work stoppage proposal was merely a bargaining chip to be thrown away as the parties came closer to agreement, but which proposal was never withdrawn by Respondent even after the onset of the strike, as well as Allison's alleged refusal to answer the questions of the Union's attorney Edwards in a meaningful way concerning what types of matters could be grieved, and his assertion at the trial that the Union refused to discuss the Respondent's management rights proposal which was denied by union business manager Logan.

The Respondent contends that the record is devoid of any evidence of dilatory tactics on the part of Respondent, but rather shows that Respondent met at all reasonable times, exchanged proposals, and reached agreement

with the Union on a number of contract clauses whereas the Union's chief negotiator Logan was absent on several occasions and that the other union representatives, who substituted for him on those occasions, were unprepared to engage in meaningful contract discussions, and further that the Union was unable or unwilling to discuss the Respondent's management rights proposal during the entire course of bargaining notwithstanding repeated attempts by Allison to persuade them to discuss Respondent's proposals or to offer counterproposals to resolve the differences between the parties. Respondent particularly relies on Logan's withdrawal of the Union's 30 September 1983 proposals as evidence of its own lack of good faith in bargaining. The Respondent relies on *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952) wherein the parties were "deadlocked on a management-function clause and the Court held that such a clause was not evidence of bad faith" and concluded the parties' "inability to reach agreement was due to the Union's unyielding position in opposing the management-function clause." Respondent also relies on *Chevron Chemical Company*, 261 NLRB 44 (1982) for the proposition that an employer's proposal of a strong management rights clause and no strike clause in conjunction with a limited arbitration clause may be merely evidence of lawful hard bargaining rather than unlawful surface bargaining by the employer. Respondent also relies on *Gulf States Manufacturers, Inc.*, 579 F.2d 1298 (5th Cir. 1978), wherein the Court reviewed the Board's finding of bad-faith bargaining against the employer and held that if any party were guilty of bad-faith bargaining it was the Union as a result of its recalcitrance in bargaining as contrasted with the

employer's willingness to meet and bargain, the employer's lack of dilatory tactics, and its assumption of "the bulk of the responsibility for preparing proposals and writing up agreements." The Respondent also relies on *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978), wherein the Court reversed the Board's finding of surface bargaining by the employer in that case and rejected as vague the Board's use of the phrase "terms which no self respecting union could be expected to accept" in the Board's finding that the employer's final offer was evidence of bad faith.

In the instant case I conclude that Respondent did, through its chief negotiator Allison, assert that it had to have a broad management rights clause, a restrictive grievance definition, and a restrictive unauthorized work stoppage clause, the combination and net effect of which, if it were successful in obtaining these clauses as set out, would have been to retain complete control in management over the terms and conditions of employment of its employees, and would have rendered the labor agreement as meaningless in view of management's unrestricted right to change the terms and conditions of employment at management's whim, and would have rendered the Union as totally ineffective in representing the employees.

After a review of all the testimony I am convinced (notwithstanding Allison's testimony at the hearing that these clauses were open to negotiation) that these clauses were presented to the Union as a *fait accompli* as what management had to have in order to reach agreement (elicited management rights which were not subject to the grievance procedure and complete waiver of all of the

employees' Section 7 rights). I do not credit Allison's assertion at the hearing that the waiver of statutory rights contained in the unauthorized work stoppage clause was a mere bargaining chip or throwaway. I find implausible that Allison would not have withdrawn this provision if it were in fact a mere bargaining chip. I find that the proposals in combination made by Respondent were unreasonable and impeded any prospects for reaching agreement. I also find that the Union sufficiently detailed its opposition to these clauses and that Respondent was well aware of this opposition, but took no steps to resolve them. I do not credit Allison's testimony that on 30 September 1984, he offered to settle all outstanding issues if the Union would agree to the insertion of "leadership ability" as a qualification for the quality control shift leader position. I find this implausible in view of Respondent's insistence on these proposals over the extended period of negotiations and credit Logan's testimony that Allison did not make such an offer. I also find that Respondent persisted in its position throughout negotiations that it had to have the control set out in its management rights, unauthorized work stoppage and grievance definition proposals, and that Allison was well aware that these were the major impediments to agreement between the parties. I reject Respondent's assertion that the stumbling block to agreement was the Union's failure to negotiate and discuss the issues, particularly the management rights clause. It is clear that Logan advised Allison what the items of dispute were with respect to his proposals, and that Allison took no significant actions to resolve the disputes, or made no significant concessions with respect to them. However, it is undisputed that Respondent was

prepared to and did meet with the Union at agreed-upon times, and that there was no evidence of a refusal of Respondent to furnish information, and there was no evidence it otherwise engaged in any technical violations concerning the mechanics of the negotiations. Rather, it appears that Respondent was somewhat more diligent in attending meetings prepared to discuss matters than was the Union, although I do not find that the Union was dilatory in bargaining.

I find that the Board law set out in *Herman Sausage*, supra, and *A-1 King Size Sandwiches, Inc.*, supra, is applicable here. I find that Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act by its insistence on the combination of its broad management rights clause, its restrictive unauthorized work stoppage clause, and its restrictive definition of a grievance, which was inconsistent with a sincere desire to reach an agreement. I do not find that the Union's withdrawal of its package proposal was evidence of its bad faith in negotiating an agreement, but find it was the result of the frustration of the Union in its unsuccessful efforts to reach an agreement, and Respondent's unwillingness to make any meaningful change in its proposals of which if had been apprised by the Union were strike issues.

I also have considered the violation of Section 8(a)(1) found herein which occurred in the 10(b) period and which in my view was indicative of Respondent's intent to frustrate the collective-bargaining process in this regard, and the various other instances of Respondent's intent to frustrate agreement which were found by the

undersigned as set out above. In making the determination that Respondent engaged in surface bargaining, I have also considered the Respondent's insistence to impasse or the waiver of the employees' statutory rights, a non-permissive subject of bargaining as found *infra* in this decision. I have also considered Allison's assertion at the hearing that Respondent's proposal that the employees statutory rights be waived was merely a bargaining chip on which he did not intend to insist. As found above, I did not credit this assertion. Thus, I find that the totality of the evidence in this case supports a finding that Respondent engaged in surface bargaining in violation of Section (8)(a)(5) and (1) of the Act.

I have also considered the Board's recent decision in *Rescar, Inc.*, 274 NLRB No. 1 (13 Feb. 1985), wherein the Board in reliance on *NLRB v. American National Insurance Co.*, 343 U.S. 395, 407-408 (1952), stated:

Moreover, it is not the Board's role to sit in judgment of the substantive terms of bargaining but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement.

In the *Rescar* case, the Board disagreed with the Administrative Law Judge's conclusion that the employer had tied together broad management rights and no strike clauses inflexibly with a severely limited grievance arbitration provision, but rather found that two of the clauses had been agreed upon early in negotiations while the third clause remained a matter of dispute at the time of the cessation of bargaining. Additionally, the Board in the *Rescar* case did not rely on a statement by the employer's

vice president that the employer would not sign a contract noting that the statement had occurred prior to a pre-settlement agreement and outside the 10(b) period.

In the instant case, unlike the *Rescar* case, all three contract clauses (the broad management rights clause, the unauthorized work stoppage clause, and the restrictive grievance procedure) were tied together, and Respondent insisted on them without substantial change throughout the course of bargaining to the point of impasse up to and including the 1 April strike and beyond. Moreover, in the instant case, the 8(a)(1) violation found (wherein Supervisor Henry told two employees that the employer would not sign a contract and that they would be replaced if the employees went on strike) occurred within the 10(b) period, as did certain of the other statements to the same effect by others of Respondent's supervisors. While the General Counsel's witnesses were unable to place the dates of these conversations, their testimony clearly established that certain of these instances occurred within the 10(b) period. Moreover, unlike the *Rescar* case, Respondent in this case insisted on the waiver of the employees' statutory rights which I have found is further evidence of its intent to frustrate the collective-bargaining process. I note also with the negotiations involved in the instant case, an initial agreement between the parties may be more difficult to achieve than an amendment to a preexisting agreement. However, I find that Respondent's stance throughout bargaining was that it had to have an agreement that would give it total control, and that it essentially maintained this inflexible position with respect to the management rights clause, the unauthorized work stoppage clause, and the restrictive

grievance procedure, and that it followed through on the threat of its supervisors and of Allison that it would replace the employees in the event of a strike.

I find also that *Chevron Chemical Company*, supra, relied upon by Respondent, is distinguishable from the instant case. In the *Chevron* case, the Board found that the employer had not engaged in bad faith or surface bargaining by insisting on its management rights, no strike, and arbitration proposals. In that case, the Board cited *NLRB v. American National Insurance Co.*, supra:

[T]he Board had been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . and specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole.

In the *Chevron* case, unlike the instant case, the Board specifically found a lack of other evidence which would support a finding of bad faith, stating at page 47:

Finally, no other unfair labor practices are involved here, and the record reflects no conduct by Respondent away from the bargaining table which would suggest that its negotiating positions were taken in bad faith.

Accordingly, I conclude and find that Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act.

2. The alleged insistence to impasse on non-mandatory subjects of bargaining

The General Counsel also contends that Respondent violated Section 8(a)(5) and (1) of the Act by its insistence

to impasse on non-mandatory subjects of bargaining in the unauthorized work stoppage proposal, specifically by its insistence to impasse on its proposal that the Union and employees waive their statutory rights to engage in unfair labor practice strikes and of access to the Board and other governmental agencies and the courts. The waiver of statutory rights in futuro as was proposed by Respondent in this case is a non-permissive subject of bargaining in conflict with public policy and insistence to impasse thereon violated Section 8(a)(5) and (1) of the Act. See *American Cyanamid Company*, 235 NLRB 1316, 1324, 1325 (1978) enf. 592 F.2d 356 (7th Cir. 1979). I find that the parties were at an impasse concerning this clause on 15 November 1983, under either Logan's or Allison's version of that meeting. This impasse continued into February 1984, up to and including the 1 April 1984 strike by the employees.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on a non-permissive subject of bargaining.

E. The alleged 8(a)(3) violations

I find that the evidence supports a finding that the strike was an unfair labor practice strike in protest of Respondent's unfair labor practices as found herein. Although other issues (such as the inspection right dispute and stewards' pay dispute) were undoubtedly on the table and discussed at the strike vote meeting, the primary focus of the strike was to protest Respondent's inflexible stand at the bargaining table concerning its management rights, grievance, and no strike proposals,

including its proposal that the employees waive their statutory rights.

It is undisputed that, subsequent to the initiation of the strike by the employees, the Respondent commenced to hire permanent replacements. When the employees learned of this and after the Union's business manager Logan learned that employees of another of Respondent's facilities would not support these employees in their strike, the Union's representative offered each of the striking employees back to work unconditionally and each employee did so individually. At that point the Respondent ceased to hire permanent replacements and shortly thereafter recalled and allowed to return to work a number of employees who had not yet been permanently replaced. It, however, refused to allow the remainder of its striking employees to return to work contending they had been permanently replaced. As of the date of the hearing, 27 of the striking employees had not been allowed to return to work notwithstanding their unconditional offer to do so.

As I have found that the Respondent violated Section 8(a)(5) of the Act by engaging in surface bargaining and by its insistence to impasse on a non-permissive subject of bargaining, I conclude that the strike was an unfair labor practice strike. It is well established that employers may not permanently replace employees engaged in an unfair labor practice strike as the Respondent did here. I accordingly find that Respondent violated Section 8(a)(3) of the Act by permanently replacing its striking employees.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES

The unfair labor practices of Respondent as found herein have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the certified bargaining representative for the following appropriate unit:

All production and maintenance employees employed by Respondent at its Kensington, Georgia facility, including lab technicians, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by the threat of discharge, and the futility of bargaining for a labor agreement with the employer issued to its employees by Respondent's supervisor.
5. Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act by engaging in surface bargaining and by insisting to impasse on the waiver of the employees' statutory rights.
6. Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing its employees who were

engaged in an unfair labor practice strike against Respondent.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take the following affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining and by insisting to impasse on a waiver of the employees' statutory rights, I shall recommend that Respondent, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

Having found that Respondent failed and refused on 6 April 1984, upon their unconditional request to return to work, to reinstate its striking employees, I shall recommend that Respondent be ordered to offer to all striking employees immediate and full reinstatement to their former positions and make them whole for any loss of earnings or benefits suffered as a result of Respondent's refusal to honor their unconditional request to return to work, with interest thereon, to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). Interest thereon shall be computed as set forth in *Florida*

Steel Corporations, 231 NLRB 651 (1977). See, generally, *Isis Plumbing and Heating Company*, 138 NLRB 716 (1962).

ORDER⁴

Respondent, Reichhold Chemicals, Inc., its officers, agents, successors, assigns shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as the collective bargaining representative of its employees by engaging in surface bargaining, and insisting to impasse on the waiver of the employees' statutory rights.

(b) Refusing to reinstate its unfair labor practice strikers pursuant to the unconditional offer to return to work.

(c) Threatening its employees with discharge or other reprisals if they engage in concerted activities on behalf of the Union, or with the futility of their continued support of the Union as their bargaining agent.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies and purposes of the Act:

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

All production and maintenance employees employed by Respondent at in Kensington, Georgia, facility, including lab technicians, but excluding an office clerical employees, professional employees, technical employee guards, and supervisors as defined in the Act.

(b) Offer to all the unfair labor practice strikers who engaged in the April 1984 strike, reinstatement to their former positions or, if those positions no longer exist, substantially equivalent positions, with full backpay and benefits with interest in accordance with the recommended "Remedy," with no loss of seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or after 1 April 1984, when the unfair labor practice strike commenced.

(c) Expunge from its files any reference to its unlawful refusal to reinstate its striking employees upon their unconditional offer to return to work on 6 April 1984, and notify them in writing of this, and that said action or notations on their personnel files shall not be used as a basis for future personnel actions concerning them.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its facility in Kensington, Georgia, copies of the attached notice marked "Appendix."⁵ Copies of said notice on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

Dated at Washington, D.C. 9 May 1985

/s/ Lawrence W. Cullen
Lawrence W. Cullen
Administrative Law Judge

⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

2
No. 90-609

Supreme Court, U.S.
FILED

OCT 23 1990

JOSEPH E. BROWN, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

REICHOLD CHEMICALS, INC.,
Petitioner,
v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the District of Columbia

TEAMSTERS LOCAL UNION NO. 515
BRIEF IN OPPOSITION

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No. 515*

QUESTION PRESENTED

Whether the decision of the Court of Appeals finding the National Labor Relations Board's determination of causation of a strike to be without substantial evidence on the record considered as a whole should be reversed under the judicial review principles established in 29 U.S.C. Sections 160(e), (f).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-609

REICHOLD CHEMICALS, INC.,
v. *Petitioner,*

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the District of Columbia

TEAMSTERS LOCAL UNION NO. 515
BRIEF IN OPPOSITION

The petitioner, Reichhold Chemical, Inc., has prayed that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia. Respondent Teamsters Local Union No. 515 opposes such review.

OPINIONS BELOW

The decision of the National Labor Relations Board is officially reported at *Reichhold Chemicals, Inc.*, 288 N.L.R.B. 69 (1988) (supplementing decision at 277 N.L.R.B. 639 (1985)) and are reprinted in the Appendix to the Petition. The decision of Administrative Law

Judge, Lawrence W. Cullen is officially reported at 277 N.L.R.B. 641, and is reprinted in the Appendix to the Petition.

The opinion of the United States Circuit Court of Appeals for the District of Columbia was filed June 22, 1990, is reported at 906 F.2d 719 and is reprinted in the Appendix to the Petition. Judgment was filed on July 2, 1990. An order denying Petitioner Reichhold Chemicals, Inc. petition for rehearing and suggestion of rehearing en banc, filed August 6, 1990, was entered by the United States Circuit Court of Appeals for the District of Columbia Circuit on September 25, 1990.

JURISDICTION

Petitioner has sought jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). However, Petitioner's petition for rehearing before the Court of Appeals, and consequently its Petition for Writ of Certiorari, are untimely. FED. R. APP. P. 40(a). For the reasons stated herein the petition for writ of certiorari should be denied. This case concerns the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*; and case law arising thereunder.

COUNTER STATEMENT OF THE CASE

Petitioner's request for review is based exclusively upon its claim that the appellate court erred in its factual conclusion that an illegal employer contract proposal was a causal factor in a strike to enforce the Union's bargaining position. The relevant facts of this unfair labor practice case are set forth in detail in the decision of Circuit Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit, 906 F.2d at 721-22. The specific analysis of the factual inferences raised by the record and which lead the appellate court to conclude that the strike was the result of an illegal employer proposal are discussed in the opinion, 906 F.2d at 723-26.

Petitioner misstates the factual record by asserting that the unlawful proposed contract clause was not mentioned in either of the strike-vote meetings. Thus, Petitioner mistakenly claims that the employees were unaware of its unlawful proposal at the time they voted to strike. *See* Petition, at 2.

The appellate court, at 906 F.2d at 721, 724-25, cites evidence in the record showing that Petitioner's bargaining proposal on a no-strike clause, which contained the unlawful no access provision, was discussed at the employee meetings by Union President N. Robert Logan. Both the court and the National Labor Relations Board found that Union President Logan did specify the exact language of the unlawful no access provision as a "strike issue" during the negotiation sessions with management. *Id.*

The appellate court also relied upon the fact that at least five of the employees participating in the strike vote were involved in the collective bargaining negotiations as members of the Union's negotiating committee and had first-hand knowledge of the specific unlawful bargaining proposal presented by Petitioner as well as the expressed position of the Union that it was a strike issue. 906 F.2d at 725, n.6.

This fact belies Petitioner's assertion in its Statement of the Case at Petition page 4 that "[t]he Court of Appeals accepted the Board's factual finding that the employees were unaware of the offending clause when they decided . . . to go on strike . . .". To the contrary, the appellate court specifically found that at least some of the employees possessed such specific knowledge. The court also noted that Petitioner's trial strategy precluded testimony by employees as to their reasons for voting to strike. 906 F.2d at 724, 725, n.6. But this ploy merely reinforced the court's conclusion that the strike vote reflected the employee's ratification of the Union's judgment

that the illegal employer proposal should be rejected, resulting in the strike to emphasize that view.

REASONS FOR DENYING THE WRIT

The Court of Appeals determined that the issue presented for decision was whether the Board's determination on strike causation is supported by substantial evidence in the record, an evidentiary issue, and not a question concerning the proper legal standard for establishing causation. 906 F.2d at 722-23, n.2. The Court of Appeals noted that the Brief of the Board stated the question before the Court was "whether the Board was 'required' to draw the factual references urged by the Union and conclude that the waiver of Board access was a contributing cause of the strike". *Id.* Because Petitioner adopted the Brief of the Board in its entirety before the Court of Appeals and did not raise any separate argument, it has waived any claim that a new legal standard was an issue addressed by the Court of Appeals. *See* FED. R. APP. P. 28(a)(4), (b), (i).

The Court of Appeals, under the provisions of 29 U.S.C. § 160(e), (f), is the court of last resort for determinations of whether the decision of the Board is supported by substantial evidence. In *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S. Ct. 453, 95 L. Ed. 479, 482-83 (1951), Justice Frankfurter explained:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under [29 U.S.C. § 160(e), (f)] finds the Board's order unsubstantiated. In such situations we should adhere to the usual rule of noninterference where

conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations”.

The question of whether substantial evidence supports a finding of the National Labor Relations Board is a question for the Court of Appeals to consider. See *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. —, 110 S. Ct. 1542, 108 L.Ed. 2d 801, 807 n.2 (1990). “Whenever an agency’s action is reversed in court for lack of ‘substantial evidence’, the reason is that the agency has ignored an inference that reasonably must be drawn, or has drawn inferences that reasonably cannot be.” *Id.*, 108 L.Ed. 2d at 830 (Scalia J., dissenting).

The opinion of the Court of Appeals for the District of Columbia Circuit on the issue of strike causation reinstated the Administrative Law Judge’s finding of a violation of Section 8(a) (3) of the National Labor Relations Act. This conclusion was reached through a process of reasoning by which the proposition—causation—was deduced as a logical consequence from other facts, and the state of facts, already proved or admitted in the record. Inferences “are not creatures of the Board but its masters, representing the dictates of reason and logic that must be applied in making adjudicatory factual determinations”. *Id.*

Each of the decisions cited by Petitioner at page 8 of the Petition stands for the proposition that if an unfair labor practice committed by the employer is a cause of a strike, then the strike must be considered an unfair labor practice strike. The Court of Appeals for the District of Columbia Circuit in the present case has applied this legal standard, arising from this Court’s precedent on this issue, to the facts in the record. See *NLRB v. International Van Lines*, 409 U.S. 48, 50-51, 93 S. Ct. 74, 34 L.Ed. 2d 201 (1972); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S. Ct. 543, 19 L.Ed. 2d 614 (1967);

Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278, 76 S. Ct. 349, 100 L.Ed. 309 (1956).

A review of the factual determinations made in each Court of Appeals cases cited by Petitioner shows that the overall legal standard of causation has been applied to the specific facts in the record of those cases. Similarly, the Court of Appeals for the District of Columbia Circuit, here, conducted a substantial evidence review of the Board's causation determination and found it wanting. Petitioners simply seek review of a factual conclusion with which they differ. There is no conflict in the legal standard applied in this case and any prior decisions of the Courts of Appeal which would merit this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia should be denied.

Respectfully submitted,

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⑦
No. 90-609

Supreme Court, U.S.
F I L E D
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JOSEPH P. SPINDOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

REICHOLD CHEMICALS, INC., PETITIONER

v.

**NATIONAL LABOR RELATIONS BOARD AND
TEAMSTERS LOCAL UNION NO. 515**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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QUESTION PRESENTED

Whether the court of appeals erred in setting aside, as unsupported by substantial evidence, the National Labor Relations Board's determination that petitioner's unfair labor practice was not a cause of a strike by petitioner's employees.



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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-609

REICHHOLD CHEMICALS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
TEAMSTERS LOCAL UNION NO. 515

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 906 F.2d 719. The supplemental decision and order of the National Labor Relations Board (Pet. App. A22-A44) are reported at 288 N.L.R.B. 69; the Board's original decision and order (Pet. App. A45-A103) are reported at 277 N.L.R.B. 639.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. A petition for rehearing was denied on September 24, 1990. The petition for a writ of certiorari was filed on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1982, Teamsters Local Union No. 515 (Union) was certified as the bargaining representative for petitioner's production and maintenance employees. In January 1983, petitioner and the Union began bargaining for an initial agreement. Over the next 13 months, the parties met in 29 separate bargaining sessions. The parties reached agreement on a broad range of subjects. Throughout the negotiations, however, the Union objected to petitioner's insistence on including in the no-strike clause a waiver of the employees' right to engage in unfair labor practice strikes. The Union also objected to a proposal to include in the no-strike clause a provision, known as the "no access" provision, that waived the employees' right to file charges with the Board if an unfair labor practice strike occurred and employees were replaced or disciplined. During bargaining, the Union president identified the no-strike clause and a management rights proposal as strike issues. Although petitioner made several concessions, it adhered to its demand for broad language in the management rights and no-strike clauses. Despite a narrowing of differences, the parties bargained to impasse without reaching an agreement. Pet. App. A3-A4, A10, A27-A28, A36, A58-A59, A73-A74, A76, A92.

In August 1983, several months into the negotiations, the Union conducted a strike vote; on April 1, 1984, after impasse had been reached, the Union did so again. At both strike-vote meetings, the employees, at the urging of the Union president, voted unanimously to authorize a strike. During both meetings, the Union president discussed a number of petitioner's proposals that he perceived as objectionable. He criticized petitioner's proposals as waiving the employees' right to challenge employer conduct during the term of the agreement, and specifically

objected to the proposed management rights and no-strike clauses as "unreasonable," "outrageous," and unlike any he had ever seen before. Pet. App. A3-A4, A10, A11-A12, A34-A36, A76-A79.

Immediately after the second strike-authorization vote, the employees began a strike. On April 6, 1984, the strike ended with the employees' unconditional offer to return to work. Petitioner refused to reinstate 27 strikers who had been permanently replaced. Pet. App. A4, A46, A77-A78, A98-A99.

2. The Union filed charges alleging, *inter alia*, that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by engaging in surface bargaining and by insisting to impasse on the waiver of employees' statutory rights. The charges also alleged that those violations of Section 8(a)(5) and (1) caused the strike, and thus rendered it an unfair labor practice strike, rather than an economic strike. Under *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956), unfair-labor-practice strikers are entitled to reinstatement with back pay, even if the employer has hired permanent replacements. Therefore, the charges alleged, petitioner's refusal to reinstate the 27 permanently replaced strikers violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. A56-A57.

The Board, in disagreement with the administrative law judge, found that the "totality of [petitioner's] conduct throughout the course of negotiations establishes that [it] engaged in hard bargaining, rather than surface bargaining." Pet. App. A47. The Board also disagreed with the judge's finding that the proposed waiver of rights contained in the no-strike clause was "an illegal bargaining subject." *Id.* at A49. Accordingly, the Board concluded that petitioner "did not violate Section 8(a)(5)" and "the strike was not an unfair labor practice strike." Pet. App. A50-A51.

In light of those findings, the Board also reversed the ALJ's finding that petitioner "violated Section 8(a)(3) by permanently replacing its striking employees." Pet. App. A51.

3. On the General Counsel's motion for reconsideration of the Board's Section 8(a)(5) findings, the Board issued a supplemental decision and order. The Board reaffirmed its ruling that petitioner had not engaged in surface bargaining, and that petitioner did not violate the Act by bargaining to impasse on a proposal to waive the employees' right to engage in unfair labor practice strikes. Pet. App. A22-A23, A31-A32.

On the issue whether it was lawful for petitioner to insist to impasse on a waiver of the employees' right of access to the Board, however, the Board reversed its earlier ruling. The Board concluded that the no-access provision concerned a non-mandatory subject of bargaining; therefore, petitioner's insistence to impasse on that proposal violated Section 8(a)(5) of the Act. Pet. App. A23, A32-A33. In classifying the no-access provision as non-mandatory, the Board noted that it is "contrary to a fundamental policy of the Act and is unrelated to terms and conditions of employment." *Id.* at A32.¹

Although the Board found that petitioner had violated the Act, it reaffirmed its previous finding that the strike was an economic strike rather than an unfair labor practice strike. The Board explained that "the General Counsel ha[d] not established the requisite causal connection between [petitioner's] unlawful conduct and the employees' decision to strike." Pet. App. A36. The Board acknowledged that the no-access provision was incorporated in the

¹ Because of this conclusion, the Board found "it unnecessary to decide whether [the no-access provision] was an illegal, as distinguished from merely permissive, subject of bargaining." Pet. App. A33 n.19.

proposed no-strike clause; that the employees struck in part in protest over petitioner's proposed no-strike clause; and that the employees voted to strike on the basis of the Union president's recommendation. *Id.* at A34-A36. Nevertheless, in light of its finding that the no-access provision itself "was never discussed with employees at either of the strike-vote meetings," the Board "decline[d] to find that this proposal played any part in the employees' decision to strike." *Id.* at A36.

4. The court of appeals affirmed the Board's decision except as to the finding of strike causation. On that issue, the court concluded that the decision was not supported by substantial evidence because the Board had improperly focused on whether the employees voting to strike had first-hand knowledge of the no-access provision and had "ignore[d]" other evidence that "proves the point on causation." Pet. App. A11. Pointing out that "the union representative's reasons for calling or recommending a strike may provide the basis for determining causation," *id.* at A14, the court found that the employees had "voted to strike solely pursuant to the Union President's recommendations" and that one of the president's reasons for recommending a strike was petitioner's insistence to impasse on the no-access provision. *Id.* at A11-A12.

The court rejected the Board's view that, "because the employees voted directly on the strike issue, their presumed lack of knowledge of the no-access provision is fatal to their causation claim." As an initial matter, the court noted that at least five employees who participated in the strike vote "presumably knew" of the proposal because of their participation in bargaining sessions in which the no-access issue was discussed. The court also noted that the record was silent as to the knowledge of the remaining employees because the administrative law judge

had prevented them from testifying about their reasons for striking. Pet. App. A12-A13.

Furthermore, the court stated, the Board's position overlooked that employees not only can "formally cede authority to a union agent to call a strike," but "can also achieve the same result" by ratifying the union agent's recommendation. Pet. App. A13-A14. "In either case, the union representative's reasons for calling or recommending a strike may provide the basis for determining causation." *Id.* at A14. Having found that "the employees voted to strike solely pursuant to the Union President's recommendation," *id.* at A11, and that his recommendation was based in part on "his view that the provisions of the no-strike clause were outrageous," the court concluded that the employees adopted "the Union leader's judgment that they should strike because of [petitioner's] demand for a no-access provision." *Id.* at A14.

Accordingly, the court set aside the Board's determination on causation, and remanded the case to the Board for modification of its order. Pet. App. A15, A20-A21.²

ARGUMENT

The court's disagreement with the Board concerning the cause of the strike turns on differing assessments of the particular facts of this case. Because the opinion neither establishes novel principles of law nor conflicts with any decision of this Court or of any other court of appeals, this Court's review is not warranted.

² Judge Silberman concurred, noting that the court was "looking at the issue on review as solely a sufficiency of the evidence question" and that the Board's decision did not appear to articulate any policy-based reasons for the Board's drawing the particular factual inferences it did. Pet. App. A21.

1. a. It is settled that a strike is an unfair labor practice strike "if an unfair labor practice had anything to do with causing" it. *General Drivers and Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir.), cert. denied, 371 U.S. 827 (1962). Accord *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981). The Board, with court approval, has held that there must be a demonstrable "causal connection" between the unfair labor practice and the strike. *Typoservice Corp.*, 203 N.L.R.B. 1180, 1180 (1973); *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d 11, 20 (D.C. Cir. 1982), cert. denied, 459 U.S. 1178 (1983); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 (5th Cir. 1978). Accordingly, the Board has held that it must engage in a case-by-case "search" for the actual causes of a strike. *Brooks, Inc.*, 228 N.L.R.B. 1365, 1367 n.12 (1977), enforced in relevant part, 593 F.2d 936 (10th Cir. 1979).

When the employees themselves make the decision to strike, "the employees' reasons for striking" are considered "good evidence" of the strike's cause. *Brooks, Inc.*, 228 N.L.R.B. at 1367 n.12. But, when employees have ceded decisionmaking authority to their union representatives, the focal point of the Board's inquiry is not "the employees' reasons for striking but rather * * * the 'impetus for the Union's decision to strike.'" *Ibid.*, quoting *Typoservice Corp.*, 203 N.L.R.B. 1180, 1180 (1973). The Board applied that principle in *Brooks, Inc.*, stating that "it was the Union that called the strike and it, indeed, did so in response to Respondent's unfair labor practices"; in that situation the "employees' motivation" was not "the decisive matter." 228 N.L.R.B. at 1367 n.12.

b. In this case, the Board found that, since the Union asked the employees to vote on the strike, the employees had retained decisionmaking authority with respect to the

strike. Accordingly, the Board gave controlling weight to testimony indicating that although a number of specific management proposals were mentioned at the strike meetings as reasons to strike, there was no explicit mention of the no-access provision. Pet. App. A36.

The court of appeals, on the other hand, found that the Board had overlooked the circumstance that the employees, in voting to strike, had relied "solely" on the Union President's recommendation. Pet. App. A11. In the court's view, the employees had effectively ceded authority to the Union to call a strike for the reasons it deemed appropriate. Because the Union president was motivated to recommend a strike at least in part by his belief that the no-access provision was "outrageous," the court concluded that the strike was caused by an unfair labor practice. *Id.* at A13-A14.³

Contrary to the contention of petitioner (Pet. 5-8) and amicus The Society of the Plastics Industry, Inc. (Br. 5), the court of appeals did not establish a new rule that either renders irrelevant the employees' motivation for striking or makes the subjective intention of union officials the determinative factor in ascertaining the cause of a strike. Rather, the court simply disagreed with the Board's assessment of the evidence, finding, contrary to the Board, that the employees relied on the Union's judgment in deciding whether to strike.⁴ While we believe that the court should

³ To qualify as an unfair-labor-practice strike, the unfair labor practice need not be the sole impetus for the strike; it need only be a "contributing cause." See, e.g., *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d at 404; *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d at 20.

⁴ The court of appeals underscored that it agreed with the Board that the issue on review was an "evidentiary" one because "neither the Board's decisions nor its brief suggests that the Board meant to endorse a *legal* principle that an employer's unlawful insistence on a

not have substituted its judgment for that of the Board, the disagreement between the Board and the court presents—as the court itself recognized (see note 4, *supra*)—only an evidentiary issue, which does not warrant review by this Court. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Nor is the court of appeals' holding in tension with the principle that "[m]ere awareness of unfair labor practices is insufficient to establish th[e] causal connection" between the practices and the decision to strike, *Road Sprinkler Fitters Local No. 669 v. NLRB*, 681 F.2d at 20, as petitioner (Pet. 9) and amicus Capital Associated Industries, Inc. (Br. 7) assert. Petitioner argues that if "mere awareness" is insufficient, "no awareness" on the employees' part must also be insufficient (Pet. 9), but that argument ignores that, as the court of appeals read the record, the causal inquiry in this case focuses on the factors prompting the Union's president to recommend a strike. It is uncontested that he was aware of and motivated by petitioner's unfair labor practice. In view of the court of appeals' determination that the employees had effectively ceded authority to the Union to decide whether to strike, the employees' asserted lack of awareness of the unfair labor practice is not germane.

2. Petitioner errs in asserting (Pet. 8-10) that the decision below conflicts with *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1320 (7th Cir. 1989); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 906 & n.21 (5th Cir. 1978); and *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820-821 (6th Cir. 1975). Although

nonmandatory subject can never be a contributing cause of [a] strike absent clear evidence that the employees were fully aware of the nature of the offending contract demand." Pet. App. A6-A7 n.2.

the courts in those cases considered the employees' reasons for striking, none of those decisions establishes a general principle that the *union's* motivation in calling a strike can never be determinative of causation.⁵ Those cases simply did not involve the causation analysis that is appropriate when the union is effectively entrusted with authority to call a strike.

Finally, petitioner's reliance (Pet. 10-11) on *Winter Garden Citrus Products Cooperative v. NLRB*, 238 F.2d 128 (5th Cir. 1956), and *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704-707 (7th Cir. 1976), is also misplaced. In *Winter Garden Citrus Products*, the court rejected the union representative's asserted reasons for the strike, finding that the actual course of bargaining revealed that the true issues motivating the strike were "at war" with the reasons asserted by the union representative in his written communications to the employer. 238 F.2d at 130.

Similarly, in *Colonial Haven Nursing Home*, the court found that, despite conclusory testimony by the union representative and the employees that the strike was in protest of employer unfair labor practices, the entirety of their testimony illustrated that the strike was precipitated by their desire that the employer recognize and bargain with the union. 542 F.2d at 705. The only unfair labor

⁵ Indeed, to the degree they address the issue at all, these cases seem to suggest that the union's reasons are, in fact, pertinent. In *Northern Wire*, for instance, the court, in finding the strike to be an unfair labor practice strike, relied in part, 887 F.2d at 1320, on the bargaining-table statements of a union representative about the possible causes of a strike—the very type of evidence relied upon by the court here. See Pet. App. A11, A13-A14. In *Airport Parking Management*, 720 F.2d at 614, the court cited *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 907 (9th Cir. 1953), for the proposition that a union business representative's testimony as to the reasons for a strike constitutes "substantial evidence" of the strike's causation.

practices that occurred before the strike were relatively minor and removed in time from the employees' decision to strike, while the strike meeting itself followed on the heels of the Board's dismissal of the union's representation petition. *Id.* at 694-695, 705. Here, by contrast, the court of appeals found it "undisputed" that the unfair labor practices played a role in the Union president's decision to recommend a strike, Pet. App. A12, and the record supports that analysis. Throughout the bargaining process, the president clearly informed petitioner that he viewed the no-access clause as both a genuine impediment to agreement and a strike-worthy issue.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1990

NOV 2 1990

JOSEPH F. SPANGLER, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Circuit Court Of
Appeals For The District Of Columbia

PETITIONER'S REPLY

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No. 90-609

In The
Supreme Court of the United States
October Term, 1990

REICHHOLD CHEMICALS, INC.,

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v.

TEAMSTERS LOCAL UNION NO. 515,
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PETITIONER'S REPLY

Petitioner Reichhold Chemicals, Inc., pursuant to
Supreme Court Rule 15.6, respectfully submits this Reply.

Respondent Teamsters' counterstatement of the case
says Petitioner "misstates the factual record by asserting

that the unlawful proposed contract clause was not mentioned in either of the strike vote meetings." (Respondent's Brief in Opposition at 3). This accusation is an unfounded attempt to divert the Court's attention from the importance of the legal issues presented by the Court of Appeals' decision. The Court of Appeals for the District of Columbia Circuit stated: "*In this case, because the matter of the no-access provision was not specifically discussed at the strike meeting, it is crucial to inquire whether the union's reasons for recommending a strike can be imputed to the employees who voted for the strike.*" (Appendix to Petition at A-11) (emphasis added). The Court of Appeals thus affirmed without question the National Labor Relations Board's finding of fact that the specific language later found by the Board to be a permissive subject of bargaining was not known to the employees when the employees voted on whether to strike.

Further, the Teamsters' characterization of the proposal as "unlawful" is similarly misleading. The Board found the proposed "no-access clause" to be a permissive subject of bargaining, and therefore found that the employer's insistence upon the clause constituted a technical violation of the duty to bargain in good faith. The Board did not find that proposing the clause was unlawful, only that insisting upon the clause to the point of impasse was a technical violation of the Act. *The Board specifically found Reichhold "engaged in lawful hard bargaining, rather than unlawful surface bargaining."* (Appendix to Petition at A-23). This finding further supported the Board's determination that the technical unfair labor

practice not known to voting employees was not a cause of the strike.

At no point does Respondent in any way address the true issues presented by the Court of Appeals' opinion. Respondent's failure to address the obvious conflicts between the decision of the court below with prior decisions in the District of Columbia Circuit, as well as prior decisions handed down by the Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeals, constitutes an admission that such a conflict exists. This case does not involve a mere dispute as to the proper inference to be drawn from the evidence. The Court of Appeals' opinion adopts an entirely new legal standard contrary to long-standing traditional tests applied in the labor relations field by the Board and the courts. Both the Court of Appeals' decision and Respondent's Brief disregard the primary role assigned to the National Labor Relations Board for determining and administering national labor policy.

This Honorable Court is, within the framework of the statute, the final adjudicator of the federal common law governing labor relations. Review of the decision below is essential to maintain consistent federal labor law and the appropriate decision-making roles of the National Labor Relations Board and the courts. For the reasons set forth in the Petition, the Briefs submitted by the *amici curiae*, and this Reply, Petitioner Reichhold Chemicals, Inc.

respectfully requests that this Court issue a writ of *certiorari* to review the decision of the Court of Appeals.

Respectfully submitted,

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MOTION FILED
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90-609

No. _____

The Supreme Court of the United States

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**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

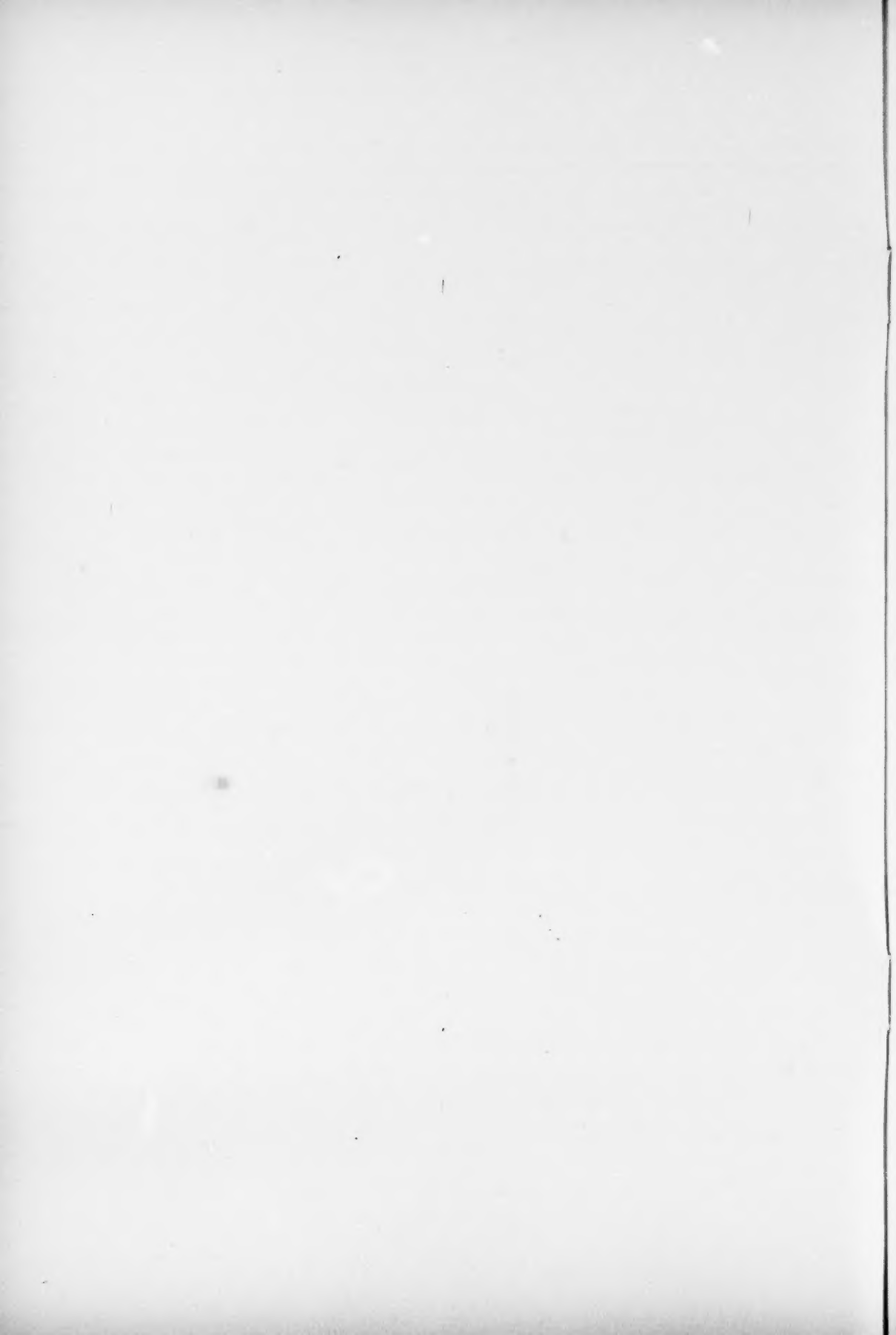
Motion for Leave to File a Brief and Brief of Capital
Associated Industries, Inc. as *Amicus Curiae* in Support of
Petition for Certiorari

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No. _____

THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

REICHHOLD CHEMICALS, INC.,

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v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED
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Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the District of Columbia Circuit

Motion by Capital Associated Industries,
Inc. for Leave to File a Brief as Amicus
Curiae in Support of the Petition for
Writ of Certiorari filed by Reichhold
Chemicals, Inc.

Capital Associated Industries, Inc.
hereby respectfully moves the Court for
leave to file the accompanying brief as
amicus curiae in support of the Petition

for Writ of Certiorari filed by Reichhold Chemicals, Inc. in the above-captioned case.

The filing of this motion is necessary under Supreme Court Rule 37.2 because the Respondent Union has refused to give its consent to the filing of this amicus brief. The amicus requested written consent of all the parties to the above-referenced case by letters dated September 17, 1990. The amicus received written consent from Mr. Chris Mitchell of Constangy, Brooks & Smith, on behalf of Reichhold Chemicals, Inc., Petitioner, and Mr. Kenneth Starr, Solicitor General, on behalf of the National Labor Relations Board, Respondent. These correspondence have been filed with the Clerk of Court. However, no written consent from the Union has been received.

Capital Associated Industries Inc. requests permission to file the enclosed amicus brief to bring relevant arguments to this Court's attention that have not been included in the Petition for Writ of Certiorari. These arguments are made on behalf of a wide variety of businesses, including both large and small employers, retailers, manufacturers, and service organizations. All of these employers have an interest in the outcome of this case since the Circuit Court's decision unduly exposes employers to unspoken motivations by Union representatives regarding the reasons for recommending a strike. These issues are more fully set out in the amicus curiae brief printed within pursuant to Supreme Court Rule 33.3.

For the foregoing reasons, Capital Associated Industries, Inc., amicus

curiae, respectfully urges this Court to grant its motion to file a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced case.

Respectfully submitted,

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No. _____

**The Supreme Court of the
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REICHHOLD CHEMICALS, INC.,

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Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia
Circuit**

**Brief of Capital Associated Industries,
Inc.,
as Amicus Curiae in Support
of the Petitioner**

**This amicus curiae brief is filed
by Capital Associated Industries, Inc.
contingent upon the Court's granting the
foregoing motion to file a brief as
amicus curiae.**



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INTEREST OF THE AMICUS CURIAE

Capital Associated Industries, Inc., (CAI), is a not for profit employer's service association headquartered in Raleigh, North Carolina. CAI's membership is in excess of one thousand (1,000) employer facilities operating in North Carolina, including numerous Fortune 500 companies, as well as smaller employers, some with twenty-five (25) or fewer employees. CAI's membership covers a broad spectrum of enterprises, including manufacturers, utilities, retailers, financial institutions, service organizations, and health care facilities; literally organizations from all areas of the private employment sector.

CAI's interest in the Circuit Court's decision in this case is manifest. The Court's decision

reversing the National Labor Relations Board's determination exposes employers to backpay liability for strikers who were not aware of the alleged unfair labor practice, and gives union representatives the unfettered ability to call for a strike using general language and to much later successfully assert an undisclosed motive behind their actions. This decision significantly alters the respective bargaining positions of employers and employees, in opposition to the Board's decision.

ARGUMENT

I

THE COURT'S DETERMINATION THAT THE EMPLOYEES VOTED SOLELY PURSUANT TO THE UNION PRESIDENT'S RECOMMENDATIONS IS CONTRARY TO THE UNDISPUTED FINDINGS OF FACT.

The Circuit Court determined that "it is unrefuted that the employees voted to strike solely pursuant to the Union President's recommendations." Teamsters Local Union No. 515 v. NLRB, No. 88-1413, slip op. at 10 (D.C. Cir. June 22, 1990). This determination is contrary to the findings of fact made by the Administrative Law Judge and affirmed by the Board in this case. These findings of fact establish that specific contract proposals were indeed discussed at both strike vote meetings. The Circuit Court's determination to the contrary cannot withstand judicial review.

The Administrative Law Judge found that the employees and the Union President met on 2 August 1983 and 1 April 1984. During these meetings, they discussed the Company's proposals on

management rights, a no-strike clause, grievances, inspection rights, and stewards. The Administrative Law Judge found that during the meetings, the attendees specifically discussed the provisions of the no-strike proposal prohibiting a strike during the term of the contract and the honoring of picket lines. Although the Union President also used general language regarding the proposals, the evidence and binding findings of fact establish that specific contract proposals were discussed at the strike vote meetings.

The Board affirmed these findings in its initial decision in this case, Reichhold Chemicals, Inc., 277 N.L.R.B. 639 (1985) ("Reichhold I"), and reiterated its position on this issue in its Supplemental Decision. See Reichhold Chemicals, Inc., 288 N.L.R.B.

69 (1988) ("Reichhold II"). The Board determined that portions of "Respondent's contract proposals were discussed at both meetings... in detail[.]" Id. at 72. These findings were not excepted to by any party and the Circuit Court's determination is without basis.

II

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A DETERMINATION THAT THE UNION PRESIDENT'S KNOWLEDGE OF THE NO ACCESS PROPOSAL WAS A MOTIVATING FACTOR.

Although the Union representative now claims that the Company's insistence to impasse on a no access clause was a motivation for the strike, that same Union representative never specifically talked about the clause with the employees before they voted to strike. Faced with the Board's determination

that the strike was economic, the Union made three arguments to the Board in its motion to reconsider. These arguments related to the issue of surface bargaining not to motivation for the strike. Only after the supplemental decision did the Union begin to argue that the no access proposal was a motivating factor for the strike.

The undisputed findings of fact establish that the employees discussed specific contract proposals in their meetings with the Union President but, significantly, the no access proposal was not discussed. This is strong evidence that the specific proposal was not a factor which motivated the President to recommend a strike. The President's knowledge of the proposal, without more, is not sufficient to make the strike an unfair labor practice

strike. As the Courts have stated on numerous occasions, "mere awareness of unfair labor practices is insufficient to establish [a] causal connection" between the unfair labor practices and a strike. Road Sprinkler Fitters Local 669 v. NLRB, 681 F.2d 11 (D.C. Cir. 1982), cert. denied sub nom. John Cuneo, Inc. v. NLRB, 459 U.S. 1178 (1983). See also NLRB v. Pope Maintenance Corp., 573 F.2d 898 (5th Cir. 1978); NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691 (7th Cir. 1976). The Circuit Court's decision in this case is contrary to its own established precedent, the decisions from other Circuits, and the Board's reasoned decision on the same facts.

III

THE COURT'S RELIANCE ON CERTAIN CASES INVOLVING THE ISSUE OF MOTIVATION IS MISPLACED.

The Circuit Court held that when employees vote to strike based solely on a Union representative's recommendation, that representative's subjective knowledge is the factor which determines whether the strike is economic or in response to unfair labor practices. In addition to the amicus' argument that the employees voted after discussing specific contract proposals, not merely on their representatives' recommendation, (see I, supra), the Court's reliance on certain cases is misplaced. More specifically, the cited cases involve situations where the employees had first-hand knowledge of, or otherwise discussed, the alleged unfair

labor practices over which they struck. In that very significant respect, those cases are distinguishable from the present case, and compel the reversal of the Circuit Court's decision.

The Circuit Court cites NLRB v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978) in support of the proposition that an unfair labor practice need only be a "contributing factor" to make a strike an unfair labor practice strike. Slip op. at 7. The amicus does not question that statement of the law, but finds the Court's citation to Moore inappropriate because of its facts.

In Moore, the employees struck because their bargaining representative was unable to reach agreement with the Company. Id. at 838. The strike was an extremely violent one and thirty-one

(31) striking employees were terminated because of alleged strike misconduct. It was later determined that some of the thirty-one (31) were wrongfully discharged. The issue presented to the court was whether the Board's determination that these "wrongful" discharges converted the economic strike into an unfair labor practice strike was supported by substantial evidence. Id. at 840. It is clear that the factual setting and the actions which make up the basis of the unfair labor practice charges in this case have no resemblance to the facts in Moore. Here, the only people aware of the Company's no access proposal were the members of the bargaining team. Additionally, there is no evidence in this record to show the employees ever discussed the no access proposal. These facts are in stark

contrast to Moore, where high profile activity (i.e., violence and termination of employment) occurred in an atmosphere where it is clear the employees knew of the actions constituting unfair labor practices. On its facts, Moore is not persuasive authority in this case.

The Circuit Court also cited Northern Wire Corp. v. NLRB, 887 F.2d 1313 (7th Cir. 1989) for the proposition that a strike need only be motivated "in part" by unfair labor practices committed by the employer for it to be an unfair labor practice strike. Id. at 1319. Again, the amicus has no quarrel with the Court's statement of the law. However, in Northern Wire, the Court pointed out that the acts constituting unfair labor practices were specifically discussed by the employees at the strike vote meeting. Just as in Moore, the

facts of Northern Wire are in sharp contrast to the facts in this case.

Likewise, in both NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399 (5th Cir. Unit A 1981), and General Drivers and Helpers Union, Local 662 v. NLRB, 302 F.2d 908 (D.C. Cir.), cert. denied, 371 U.S. 827 (1962), two other cases cited by the Circuit Court, the courts relied on facts that showed the employees discussed or had first-hand knowledge of their employer's unfair labor practices before they voted to strike. Additionally, the specific unfair labor practices were discussed at strike vote meetings. This is not the case here. In this case, although the employees and the Union President discussed various of the Company's contract proposals, there was no evidence that the specific no access

provision was discussed in either meeting.

Insofar as the Circuit Court relied on the above-cited decisions when deciding the question of motivation, the Court went beyond the bounds of that precedent and significantly changed the application of existing law. In so doing, the Court rejected the Board's determination of the same issue on the same facts and failed to give the Board's considered decision proper deference.

CONCLUSION

This case presents an important question in the administration of the National Labor Relations Act. For the reasons stated above, as well as those set out in the Petition, the amicus

curiae respectfully requests the
Petition for Writ of Certiorari be
granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing Amicus Curiae Motion and Brief on all parties required to be served by enclosing the proper number of copies of same in a postpaid, properly addressed envelope, which was deposited in the United States mail as follows:

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This the 22nd day of October, 1990.

Bruce A. Petesch



OCT 24 1990

JOSEPH F. SPANIOL, JR.
CLERK

4
No. 90-609

IN THE
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October Term, 1990

REICHHOLD CHEMICALS, INC.,
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AND HELPERS OF AMERICA,
AND NATIONAL LABOR RELATIONS BOARD
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
IN SUPPORT OF PETITIONER**

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October 24, 1990

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Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF AMICUS CURIAE OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
IN SUPPORT OF PETITIONER**

This brief is respectfully submitted on behalf of The Society of the Plastics Industry, Inc. (sometimes referred to as "SPI"), as amicus curiae. Pursuant to Rule 37.2 of the rules of this Court, SPI has obtained and filed the written consent of each of the parties to the filing of this brief. SPI supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

This case addresses the appropriate test for determining whether an employee strike is an "unfair labor practice strike" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (sometimes referred to as "the Act"). The question presented to the Court is whether a strike can be characterized as an unfair labor practice strike when: (i) the unfair labor practice in question was never communicated to the striking employees before they voted to strike, and (ii) the decision of the employees to strike was based solely on a union official's subjective recommendation to strike.

INTEREST OF AMICUS CURIAE

The Society of the Plastics Industry, Inc. is a 2,000 member not-for-profit corporation organized under the laws of the State of New York. The Society's members include processors and manufacturers of plastics or plastics products, suppliers of raw materials, processors and converters of plastics resins, and manufacturers of accessory equipment of the plastics industry. Founded in 1937, SPI is the major national trade association of the plastics industry.

The U.S. plastics industry employs approximately 1.5 million workers. There are over 12,000 domestic plastics production facilities located throughout the 50 states. Virtually all plastics industry employers are subject to the National Labor Relations Act. Many plastics industry facilities, including those of certain SPI member companies, are unionized and, therefore, are subject to the particular labor relations principles at issue here. Moreover, the court of appeals' decision has far-reaching implications for the conduct of collective bargaining agreements in general and for the free flow of commerce. SPI members will be affected by any disruption to the bargaining process and by any obstruction to commerce.

The resolution of the issues raised by this case will affect future decisions of the National Labor Relations Board (sometimes referred to as "NLRB") and of the courts. Thus, although in theory the resolution of this case will affect only these particular parties, in reality, the practical impact of the decision will be broad, affecting virtually all private-sector employers whose employees are represented for collective bargaining purposes by labor organizations, as well as those firms whose employees may be organized in the future. For this reason, the Court's decision in this case or its failure to correct the decision below will have a direct and substantial effect on SPI and its members.

SUMMARY OF ARGUMENT

The court of appeals' holding that the employees' decision to strike in this case was caused by the employer's unfair labor practice, even though the voting employees had no awareness of the unfair labor practice in question, frustrates the policies and purposes of the National Labor Relations Act. The decision impedes a fair collective bargaining process and may create increased industrial unrest, discourage peaceful employee self-organization, and obstruct the free flow of commerce — all key objectives Congress sought to achieve in the Act. The court's decision here conflicts with its own prior case law, as well as that of the U.S. Court of Appeals for the Fifth, Sixth, Seventh, and Ninth Circuits. Further, the decision rejects the well-settled test established by the NLRB — the tribunal Congress created to administer the federal labor relations laws — for determining whether an unfair labor practice strike has occurred. The decision has broad implications for employers, labor organizations, and employees (including those workers who are now organized and those who may face questions concerning union representation in the future).

ARGUMENT

I. The Court of Appeals' Decision Will Frustrate the Purposes and Policies Underlying the National Labor Relations Act.

The overriding purpose of the National Relations Labor Act is to remove obstructions to the free flow of commerce by eliminating certain recognized sources of industrial strife. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); *NLRB v. Waumbec Mills, Inc.*, 114 F.2d 226, 232 (1st Cir. 1940). In Congress' judgment, both employer interference with employee organization within the workplace and certain union practices, such as strikes, have the effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce. 29 U.S.C. § 151. Therefore, Congress declared it to be the policy of the United States to protect the domestic commerce by encouraging the practice and procedure of collective bargaining and by protecting employee rights to self-organization. *Id.*

To effectuate its goals, Congress prohibited certain unfair labor practices by employers and labor organizations alike. 29 U.S.C. § 158 (a) and (b). Moreover, it created the National Labor Relations Board to "give coordinated effect to the policies of the [National Labor Relations] Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953). Congress "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . ." *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America, et al. v. Lockridge*, 403 U.S. 274, 287 (1970), *reh'g denied*, 404 U.S. 874 (1971) (quoting *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490-91 (1953)).

The NLRB, in its capacity as the primary adjudicator of labor disputes, is frequently called upon, as it was here, to determine whether an employee strike is an unfair labor practice strike or an economic strike. The distinction is critical to both sides of a labor-management dispute: unfair labor practice strikers "do not lose their status [as employees] and are entitled to reinstatement with back pay, even if replacements for them have been made." *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956), *reh'g denied*, 351 U.S. 980 (1956)). In making this determination, the NLRB has applied a consistent test that focuses objectively on whether the striking employees were aware of the unfair labor practice in question and what actually motivated the employees to vote to go on strike. See, e.g., *Vanguard Tours, Inc., et al.*, 300 N.L.R.B. No. 30 (1990); *Airport Parking Management*, 264 N.L.R.B. 5 (1982), *enforced*, 720 F.2d 610 (9th Cir. 1983); *Burlington Homes, Inc. and United Brotherhood of Carpenters and Joiners of America, AFL-CIO a/k/a Carpenters Industrial Council of Eastern Pennsylvania*, 246 N.L.R.B. 1029 (1979).

In this case, the court of appeals rejected this objective test and instead adopted a subjective test for determining whether an employee strike will be characterized an unfair labor practice strike. Under the court of appeals' test, a union representative's unexpressed subjective reasons for recommending a strike can be imputed to the employees who voted for the strike. *Teamsters Local Union No. 515, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 906 F.2d 719, 724-26 (D.C. Cir. 1990). According to the court of appeals below, an employee strike may be "caused" by unfair labor practices, and therefore characterized as an unfair labor

practice strike, even though the person or persons responsible for deciding to strike had no specific knowledge of the unfair labor practice.

By focusing only on what a union official believes to be the cause of the strike, rather than on what the striking employees believe to be its cause, the court of appeals' decision disturbs the delicate balance between employers and labor organizations created by Congress in the National Labor Relations Act. As a result, employers will be hesitant to engage in hard, lawful bargaining for fear that a breakdown in that bargaining and a subsequent employee strike could be instantly converted from an economic to an unfair labor strike by the mere *post hoc* rationalization of a union official. Moreover, by allowing a strike to be so converted, employers' rights and the rights of replacement workers will be diminished. These effects are contrary to the purposes and policies underlying the Act.

By tipping the collective bargaining power in favor of employees and their unions in this critical area, the decision below may well lead to more frequent labor strikes. Congress recognized that the industrial strife it sought to avoid was not solely caused by employers when it stated,

[e]xperience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Because the court of appeals' decision allows employees to insulate themselves against a finding that the cause of their strike was economic, not unfair labor practices, by simply adopting the unexpressed or unexplained representation of their union official, employees will encounter less risk in striking and will be more prone to strike rather than continuing to bargain. A reduction in strikes, and their ill effects on the common good, was central to Congress' purposes in enacting the National Labor Relations Act. The court of appeals' decision thwarts this purpose.

Finally, because the court of appeals' decision effectively posits the determination of the cause of a strike in a union official's mind, rather than in the neutral and expert NLRB, the decision may hamper, not encourage, full freedom of association and self-organization. Faced with uncertainty in the collective bargaining process, and a disadvantaged bargaining position, employers whose workforces are not currently organized may actively oppose unionization efforts. Again, the result is increased industrial unrest, instead of the industrial peace Congress intended to advance by the Act.

II. The Decision Below Creates a Conflict Between the Circuit Courts.

The court of appeals found that the determination that a strike was caused by unfair labor practices can be based on what a union official knew about such unfair labor practices, not what he communicated to the decisionmakers — the striking employees. The decision is a departure from the NLRB's longstanding objective test, as well as from the D.C. Circuit's own precedent. Moreover, it conflicts with the position of other federal appellate courts which have previously addressed the issue.

In its decision in *Road Sprinkler Fitters Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982), *cert. denied sub nom. John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983), the court of appeals followed the NLRB's traditional test for determining the character of a strike. The court affirmed the Board's reversal of the Administrative Law Judges's decision that a strike had been an unfair labor practice strike because the striking employees were aware of the unfair labor practices prior to the strike. In so doing, it articulated the NLRB test as follows:

'Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices.' *John Cuneo, Inc.*, 253 N.L.R.B. at 1026. . . . The Board found nothing in the record to indicate that the *employees* were striking for any reason other than to gain recognition of the Union as their bargaining representative. We agree with the Board's characterization of the strikers' initial purpose as recognition. A lawful strike for union recognition is an economic strike, unless unfair labor practices committed by the employer are a 'contributing cause' of the strike. *Mere awareness of unfair labor practices is insufficient to establish the causal connection.* [citations omitted] The Board fairly read the record here when it concluded that the *employees'* purpose in striking the Company was only to gain recognition for the Union and not to redress the unfair labor practices . . .

Road Sprinkler Fitters, 681 F.2d at 20 (emphasis added).

In this case, the court recognized that the "'real and actuating motivation' for the strike" is the dispositive criterion in determining whether a strike was one for unfair labor practices,

906 F.2d at 724 (quoting *NLRB v. Pope Maintenance Corp.*, 573 F.2d at 906, and acknowledged that “the matter of the no-access provision [the unfair labor practice] was not specifically discussed at the strike meeting.” *Id.* Nonetheless, the court inexplicably departed from the NLRB’s test and its prior decision in *Road Sprinkler Fitters* when it held that the *union official’s* subjective, unexpressed reasons for recommending a strike may provide the basis for establishing causation. *Teamsters*, 906 F.2d at 726.

Apart from conflicting with the NLRB’s and its own precedent, the court of appeals’ decision here also conflicts with the position of other circuits. In *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976), the Seventh Circuit held that although the union’s representations about the nature of the strike (that it was an unfair labor practice strike) may have influenced employees to vote to strike, that “causal relationship should not obscure what was the real and actuating motivation.” *Id.* at 706. In reaching its decision that the strike was not one for unfair labor practices, the court gave considerable weight to the employees’ lack of any knowledge of the precise unfair labor practices the employer had committed. *Id.* (“The witnesses fell back when asked as to the reasons for the strike on the simplistic but non-detailed attribution of unfair labor practices.”).

Likewise, in *Winter Garden Citrus Prod. Coop. v. NLRB*, 238 F.2d 128 (5th Cir. 1956), the Fifth Circuit rejected a union representative’s contentions (as evidenced in two letters written by the representative) that the employees’ strike was motivated by unfair labor practices as the “self-serving actions of a man who saw his cause slipping.” *Id.* at 130. The court held that there must be proof of a causal connection between the unfair labor practice and the strike to justify a finding of an unfair labor practice strike; the evidence viewed as a whole failed to establish the requisite causal connection.

Id. at 129-30. In a more recent decision which held that employees engaged in a strike in part for the purpose of eliminating unfair labor practices, the Fifth Circuit noted that "union members engaged in a strike . . . cannot be insulated from the consequences of such a strike merely by mislabeling their action as a unfair labor practice strike." *NLRB v. Pope Maintenance Corp.*, 573 F.2d at 906. The Court was not confronted with such a situation, however, because the strike vote followed numerous and widespread violations of the National Labor Relations Act by the employer, of which the employees knew and which they testified caused them to strike. *Id.*

The Sixth and Ninth Circuits also have reached conclusions consistent with that urged by Petitioner and SPI in holdings that required clear showings that unfair labor practices were contributing causes of the strikes at issue. In *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814 (6th Cir. 1975), the employees discussed the employer's unfair labor practices at three separate meetings before they voted to strike. Substantial evidence also supported the conclusion that they were inclined to strike as a result of the unfair labor practices. *Id.* at 821. Accordingly, the Sixth Circuit was constrained to find the necessary causal connection between the employees' strike and the unfair labor practices. Finally, the Ninth Circuit found that unfair labor practices were a 'contributing cause' of a strike in *Airport Parking Management v. NLRB*, 720 F.2d 610 (9th Cir. 1983). The court was persuaded to reach this result by the evidence establishing that the employees unsuccessfully voted to strike before the unfair labor practice (wrongful discharge of an employee) but successfully voted to strike following the unfair labor practice.

III. The Issue Presented Is Fundamental to Future Labor Relations Decisions.

The issue presented in this case is of considerable importance to employers, employees and labor organizations. Because the characterization of a particular labor strike, and thus whether employees are entitled to reinstatement and backpay, is a recurring issue in proceedings before the NLRB, it is crucial that the proper standard for making that determination be resolved. Until it is, employers will be considerably disadvantaged in reaching fair collective bargaining agreements with their employees. Employees and labor organizations, in turn, may face heightened hostility to their lawful right to full freedom of association and self-organization.

The court of appeals' decision, if allowed to stand, will unsettle the balance of power between competing interests in the context of collective bargaining and thus disturb the orderly and free flow of commerce. The important and recurring nature of the issue presented here warrants the Court's review.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari and reverse the ruling of the court of appeals.

Respectfully submitted,

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October 24, 1990

MOTION FILED
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No. 90-609

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

REICHHOLD CHEMICALS, INC.,
Petitioner,

v.

TEAMSTERS LOCAL UNION No. 515, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA and NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF
ON BEHALF OF THE CARPET AND RUG INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI FILED BY
REICHHOLD CHEMICALS, INC.

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MOTION ON BEHALF OF CARPET AND
RUG INSTITUTE FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI FILED BY
REICHHOLD CHEMICALS, INC.

The Carpet and Rug Institute (CRI) hereby respectfully moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari filed by Reichhold

Chemicals, Inc., in the above-captioned case. In support of its motion, CRI shows as follows:

1. The filing of this motion is necessary under Rule 37.2 of the Rules of this Court, because the Respondent union has refused to give its consent to the filing of this amicus brief.

2. CRI is an association of corporate members engaged in the manufacture and sale of tufted floor coverings. CRI has 158 corporate members who operate 321 manufacturing plants throughout the United States. These facilities employ approximately 48,000 persons and produce goods with an estimated annual retail value of \$12 billion. In addition, CRI has 110 associate members who generally supply regular members with raw materials such as backing, yarn, and services.

3. Most of CRI's members and associate members are employers subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Some manufacturing facilities operated by CRI members have ongoing collective bargaining relationships with labor unions. Others presently operate on a nonunion basis but are always subject to the possibility of future collective bargaining relationships and to the potentiality of strikes.

4. As such, CRI's members and associate members have a real interest in the issue presented by the petition in this case, concerning the standards to be applied by the National Labor Relations Board and the federal courts in determining whether to classify a strike as an "unfair labor practice strike" or an "economic strike."

5. The classification of a strike as an unfair labor practice strike versus an economic one is often de-

terminative of the strikers' eligibility for immediate reinstatement and backpay at the conclusion of the strike. Against this background, all persons subject to the Act have an interest in seeing that the standards applied by the NLRB and the courts in making this determination be as clear and consistent as possible.

6. CRI requests leave to file this *amicus* brief to bring to the Court's attention information and arguments not raised in the petition concerning the practical consequences of the court of appeals' departure in this case from the traditional approach used by the Board and the courts in determining whether the requisite causal connection has been established between a strike and an employer's unfair labor practice to warrant classifying the strike as an unfair labor practice strike. CRI is concerned that, by shifting the focus of this inquiry away from the information that motivated the *employees* to decide to strike, and concentrating instead on what a *union representative* later claimed to have had in his mind when he recommended that the employees vote to strike, the court of appeals' decision creates a conflict in the law that, if allowed to stand, will have serious potential consequences for the administration of the National Labor Relations Act.

7. The *amicus* did not learn of the petition in time to file this motion and accompanying brief within the applicable time limit under Rule 36.1 of this Court's Rules, but has complied as nearly as possible under the circumstances with that time limit. Since no response to the *amicus* brief is required, the respondent will not be prejudiced by the granting of this motion.

For the foregoing reasons, the Carpet and Rug Institute respectfully requests that the Court grant it leave to file the accompanying brief as *amicus curiae* in support of the petition in this case.

Respectfully submitted,

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On Petition for Writ of Certiorari to the
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for the District of Columbia Circuit

BRIEF ON BEHALF OF THE CARPET AND
RUG INSTITUTE AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION

The Carpet and Rug Institute respectfully submits this brief as amicus curiae, contingent upon the granting of the accompanying Motion For Leave To File. The amicus supports the petitioner in urging the Court to grant a writ of certiorari to review the

decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae in the issue raised by the petition is detailed in the accompanying Motion for Leave. As employers whose operations include both unionized and nonunion facilities throughout an important U.S. industry, the members and associate members of the amicus curiae have a vital interest in assuring that the standards applied by the National Labor Relations Board and the federal courts in determining whether to classify a strike as an "unfair labor practice strike" or an "economic strike" be as clear, consistent and objective as possible.

The standard used by the court of appeals to make that determination in this case differs materially from the standard consistently applied by the NLRB and the courts of appeals in a long line of prior cases. By focusing upon a union representative's subjective, after-the-fact assertions about his own, unstated reasons for recommending a strike to the employees, rather than upon the information that actually motivated the employees when they decided to strike, the decision below makes it virtually impossible for an employer to know at the time a strike occurs whether or not it will be classified as an unfair labor practice strike. It also makes it virtually impossible for an employer ever to refute a union's contention that there was a causal connection between an unfair labor practice and a subsequent strike.

Thus, the decision below creates a conflict in the circuits that will have important, widespread consequences for employers subject to the National Labor

Relations Act, 29 U.S.C. § 151 *et seq.*, including the employers represented by the *amicus curiae*.

STATEMENT OF THE CASE

The relevant facts are set forth in detail in the petition and in the decisions below. Briefly, the National Labor Relations Board, with one member dissenting, held that the "no-access" clause of a no-strike proposal presented by the employer during collective bargaining negotiations was a non-mandatory subject of bargaining, and that the employer therefore committed an unfair labor practice when it insisted on that clause to the point of impasse.¹ The Board found unanimously, however, that the employer's bargaining conduct was lawful in all other respects, and that its insistence on the no-access clause was not a cause of the strike that occurred at its plant in April 1984.

In finding that the employer's insistence on the no-access clause was not a cause of the strike, the Board focused on "the information on which the employees acted when they voted to strike." (Pet. App. A-36). Noting that there was no evidence that the employees even knew about the no-access clause, the Board "decline[d] to find that this proposal

¹ The proposed no-access clause provided that employees who engaged in prohibited strikes during the term of the contract would be subject to discipline without recourse to the NLRB or any other tribunal. Initially, a 3-member NLRB panel found unanimously that this provision was lawful and proper. (Pet. App. A-48 to A-50). Upon reconsideration, however, a majority of the Board, with one member dissenting, reasoned that insofar as the no-access clause effected an *in futuro* waiver of access to NLRB processes, it was not a mandatory subject of bargaining. (Pet. App. A-32).

played any part in the employees' decision to strike." (*Id.*). Since the strike thus had no "causal connection" to an unfair labor practice, the Board found that it was not an unfair labor practice strike. Accordingly, the Board held, the employer acted within its rights when it hired permanent replacements for the strikers. (Pet. App. A-36 to A-37).

The court of appeals reversed the Board's determination and ruled that the strike was an unfair labor practice strike. Rejecting the Board's holding that the information on which the employees acted "is what is crucial" in making this determination (Pet. App. A-36), the court of appeals focused instead on what was in the mind of the union's chief spokesman when he recommended that the employees vote to strike. Based on the union spokesman's testimony that the no-access clause was one of his unspoken reasons for his recommendation, the court concluded that proposal had been a cause of the strike. (Pet. App. A-11 to A-14). Therefore, it held, the employer's hiring of replacements was unlawful.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AND CLARIFY THE LEGAL STANDARDS FOR DETERMINING WHETHER A STRIKE IS AN "UNFAIR LABOR PRACTICE STRIKE" OR AN "ECONOMIC STRIKE"—A DETERMINATION OF PIVOTAL IMPORTANCE IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT.

Few determinations in labor law have more important practical consequences than whether a strike is to be classified as an "unfair labor practice strike" or an "economic" one. If it is an economic strike, the employer generally is free to hire permanent replacements for the strikers. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Once that is done, even if the strikers later offer unconditionally to return to work, the employer ordinarily is obliged only to put them on a "preferential reinstatement list" from which it will recall them as positions become available. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

If a strike is determined to be an unfair labor practice strike, however, the strikers generally are entitled to immediate reinstatement upon demand, displacing any workers hired in the interim to replace them, and the employer becomes liable for backpay commencing upon the strikers' unconditional offer to return to work. See *Mastro Plastics Corp v. NLRB*, 350 U.S. 270, 278 and n.9 (1956).

Unless a struck employer is able to assure potential replacements that they will have continuing employment after the strike is over, the employer will in many cases be unable to hire enough replacements to

keep its operations going. See, e.g., *Oversight Hearings on Practice and Operations Under the National Labor Relations Act*, Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor, 100th Cong., 2d Sess., pp. 135-136 (March 1988). An employer's ability to survive the consequences of a strike, therefore, often hinges directly on whether the strike is classified as an unfair labor practice strike or an economic one.

Despite the pivotal importance of this determination, a struck employer generally has no way of obtaining a ruling on how a strike will be classified until long after it has had to decide whether or not to hire permanent replacements. Thus, the employer must act at its peril in taking this step. If it proceeds on the assumption that the strike is an economic one, but is later told by the NLRB or a federal appeals court that it was an unfair labor practice strike instead, the employer may face a Hobson's choice when the strike is over. If it displaces employees hired as permanent replacements in order to make way for the returning strikers, it may face liability for breach of promises made to the replacements when it recruited them. Cf. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). On the other hand, if the employer rejects the strikers' unconditional request for reinstatement, it may face ruinous backpay liability.

Against this background, it is imperative that the law afford all parties clear, consistent, objective standards for determining whether a strike will be classified as an economic or an unfair labor practice strike. Unfortunately, the decision of the court of appeals in this case does just the opposite; it blurs

the applicable standard on the critical issue of causation—i.e., whether there is a sufficient causal connection between an unfair labor practice and a strike to justify classifying it as an unfair labor practice strike. Indeed, the decision below specifically rejected the Board's finding that the information on which the employees acted is the "crucial" determining factor, thus creating a split between the standards applied by the NLRB and the D.C. Circuit.

The decision below also creates a split between the D.C. Circuit and other federal courts of appeals on this issue. Where, as here, a decision to strike has been made by a vote of the employees, rather than by a union official's fiat, the courts traditionally have treated the issue of causation as a question of fact turning upon the information that motivated the *employees* in their decision. *E.g.*, *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 821 (6th Cir. 1975) (in finding that strike was unfair labor practice strike, court focused on evidence that unfair labor practices were specifically discussed at a series of employee meetings after which decision to strike was made); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614 (9th Cir. 1983) (court focused on evidence that employees discussed discharge constituting unfair labor practice "before the successful strike vote").

Under this traditional approach, causation is addressed in much the same way as many other issues of motivation that arise in labor law. It requires evidence that the employees *knew* of the existence of the conduct constituting an unfair labor practice and that they *based* their decision to strike or to continue striking, at least in part, on that conduct. *Compare*

NLRB v. Pope Maintenance Corp., 573 F.2d 898, 906 (5th Cir. 1978) (court stressed employee testimony that one of their reasons for striking was to eliminate employer's unfair labor practices), with *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704-707 (7th Cir. 1976) (court rejected NLRB's finding that unfair labor practices caused strike, relying instead on administrative law judge's contrary finding that credible evidence showed employees' real motivation was to gain recognition).

In this case, however, although the court of appeals purported to treat causation as an issue of fact, it materially changed the focus of the factual inquiry. Instead of looking, as precedent would dictate, at the information the *employees* had before them when they decided to strike, the court of appeals here looked at what the *union's spokesman* later claimed he had in mind when he urged the employees to strike.

Thus, the court of appeals impermissibly substituted its own view for the NLRB's expert view as to how the cause of a strike properly should be determined when the decision to strike has been made by employees rather than by a union official. Cf. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1549 (1990). In doing so, it created a new rule of law that differs materially from the prior holdings discussed above on how causation is to be determined in such situations.

If the court of appeals' approach is accepted, it will make it virtually impossible for employers in most cases to know at the time a strike occurs whether or not it is an unfair labor practice strike. Under the court's approach, whenever any conduct

constituting an unfair labor practice is alleged to have occurred, a union representative can simply assert that it was that conduct which motivated him to recommend that the employees vote to strike. If, as the decision below indicates, nothing more than the union agent's uncorroborated assertion is required to establish causation, it will be virtually impossible in most instances for the employer to refute such a contention. In practical effect, then, the court of appeals' approach virtually eliminates the need for proof of causation in such cases.

Thus, the court of appeals' decision raises much more than just a question of the sufficiency of the record evidence to support the NLRB's factual findings. Rather, it poses a fundamental question of statutory interpretation with important consequences for the administration of the Act—i.e., whose motivation is controlling in determining whether a strike was caused or prolonged by an employer's unfair labor practice? Is it, as precedents would indicate, the motivation of the employees who voted to strike that counts? Or is it, as the decision below holds, the motivation of the union representative who recommended that they vote that way? By rejecting the Board's answer to this question and substituting its own, diametrically opposite approach, the court of appeals has created a conflict among the circuits on a fundamental point of labor law having enormous practical consequences for employers, unions and employees alike.

CONCLUSION

For the reasons discussed above, this Court should grant certiorari to resolve the conflict in the circuits and clarify the legal standards governing this important question in the administration of the National Labor Relations Act.

Respectfully submitted,

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